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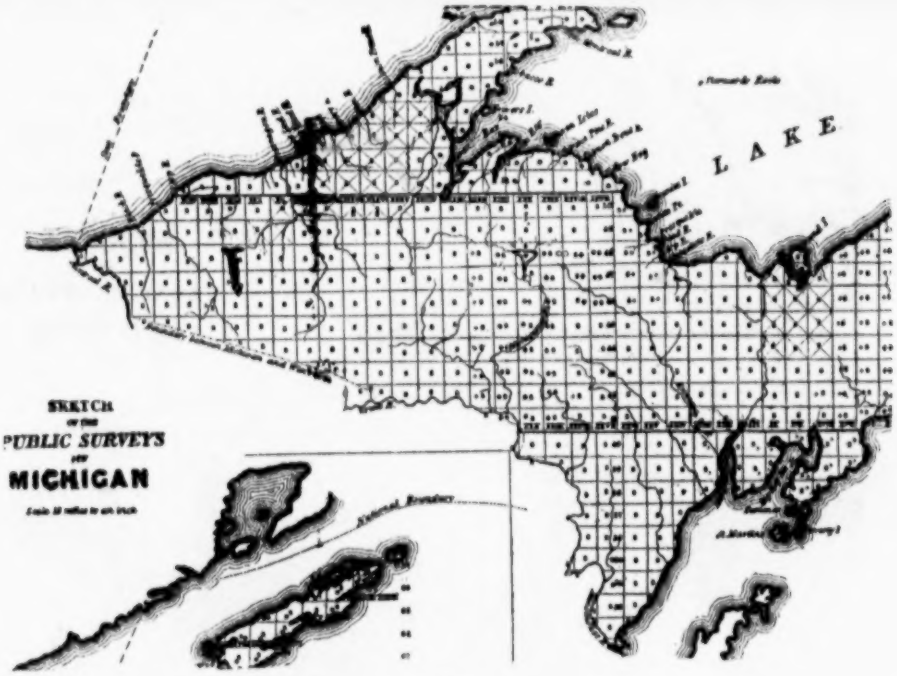


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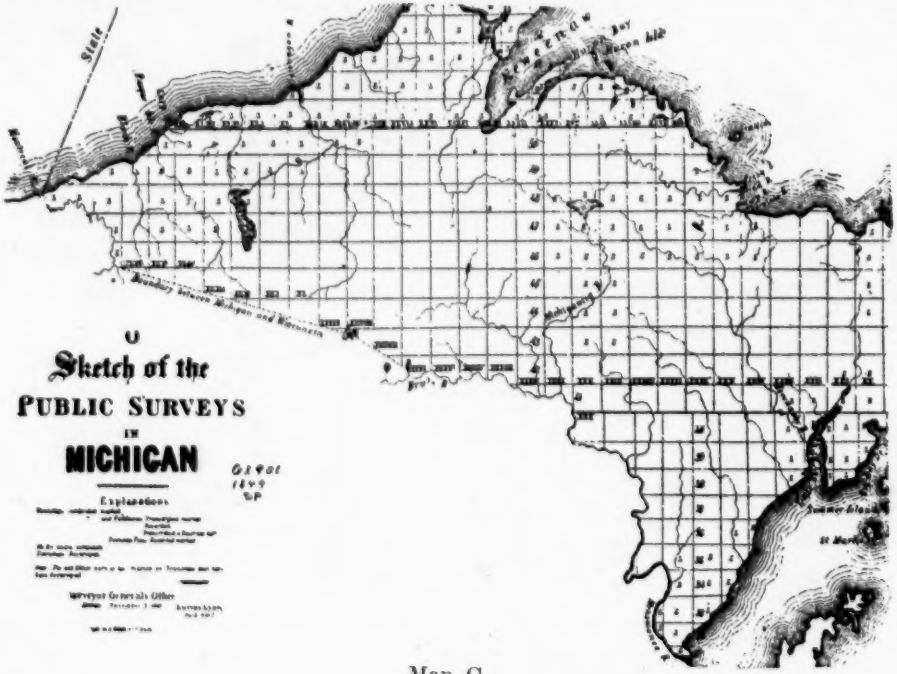
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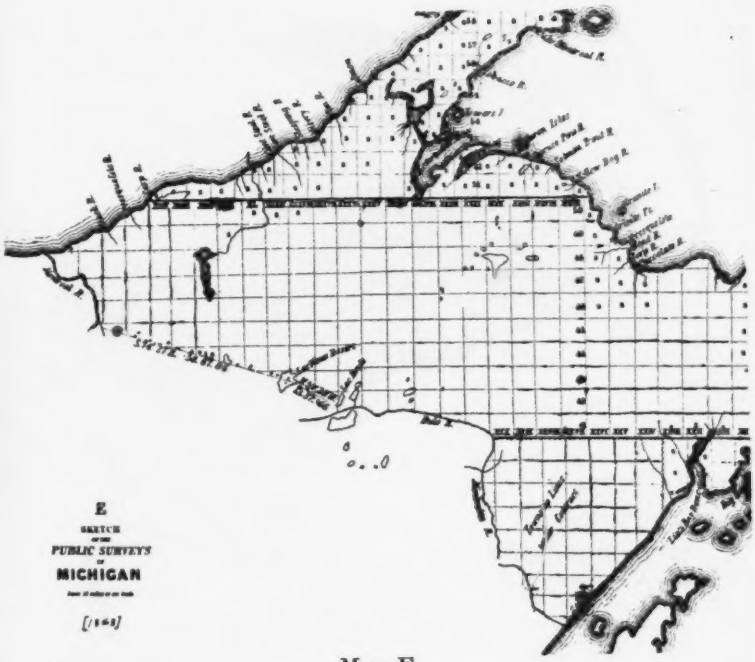


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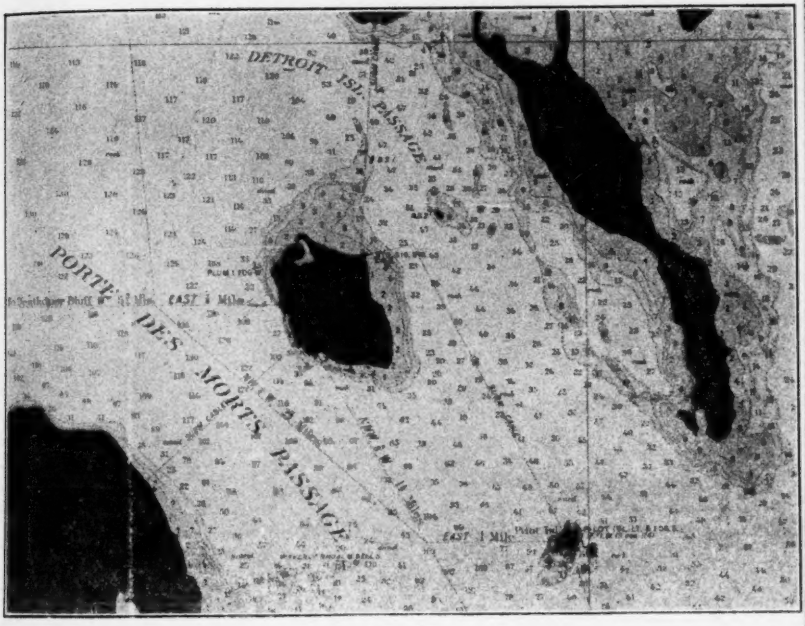


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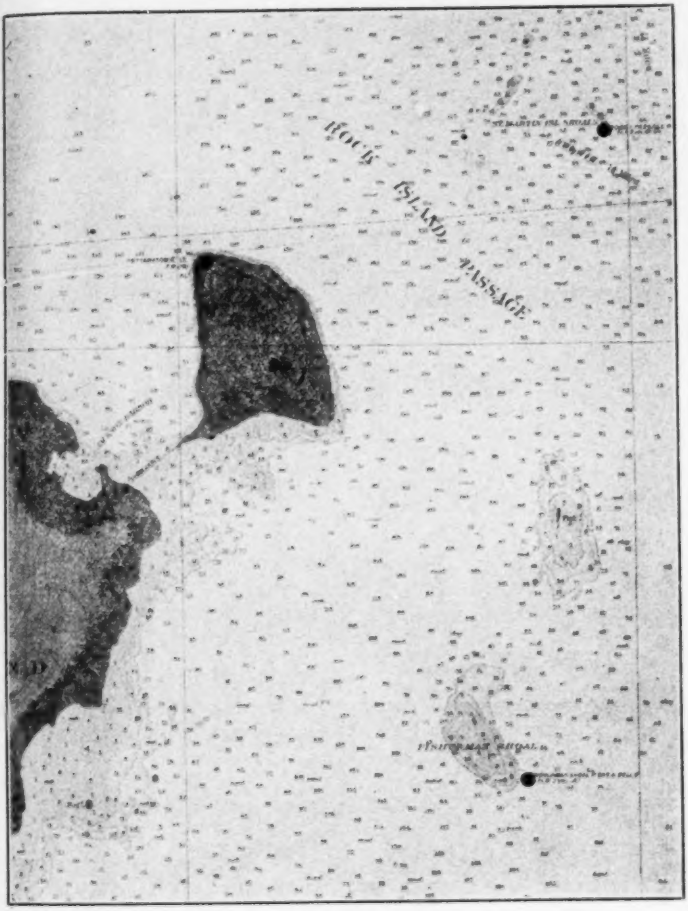


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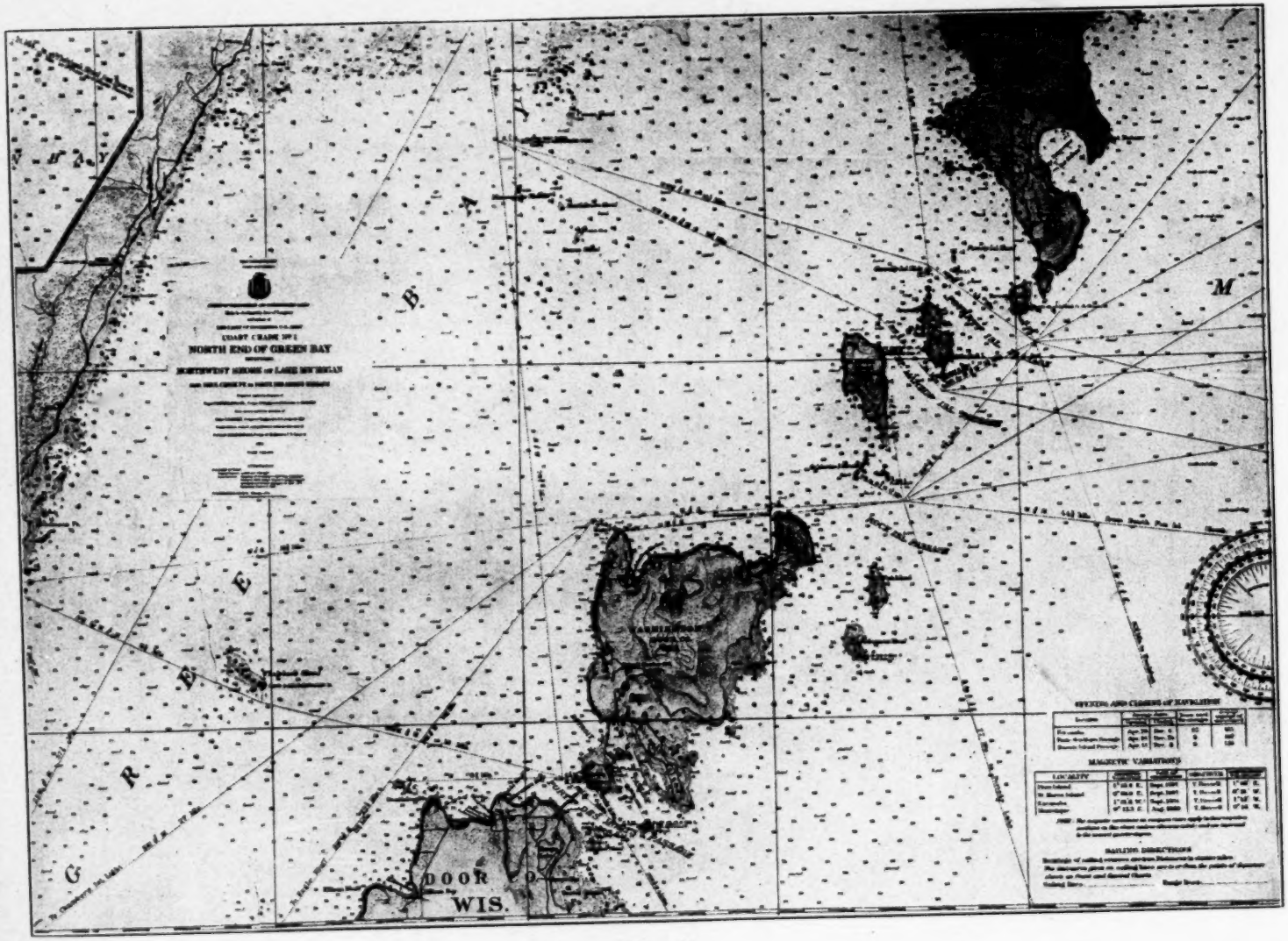


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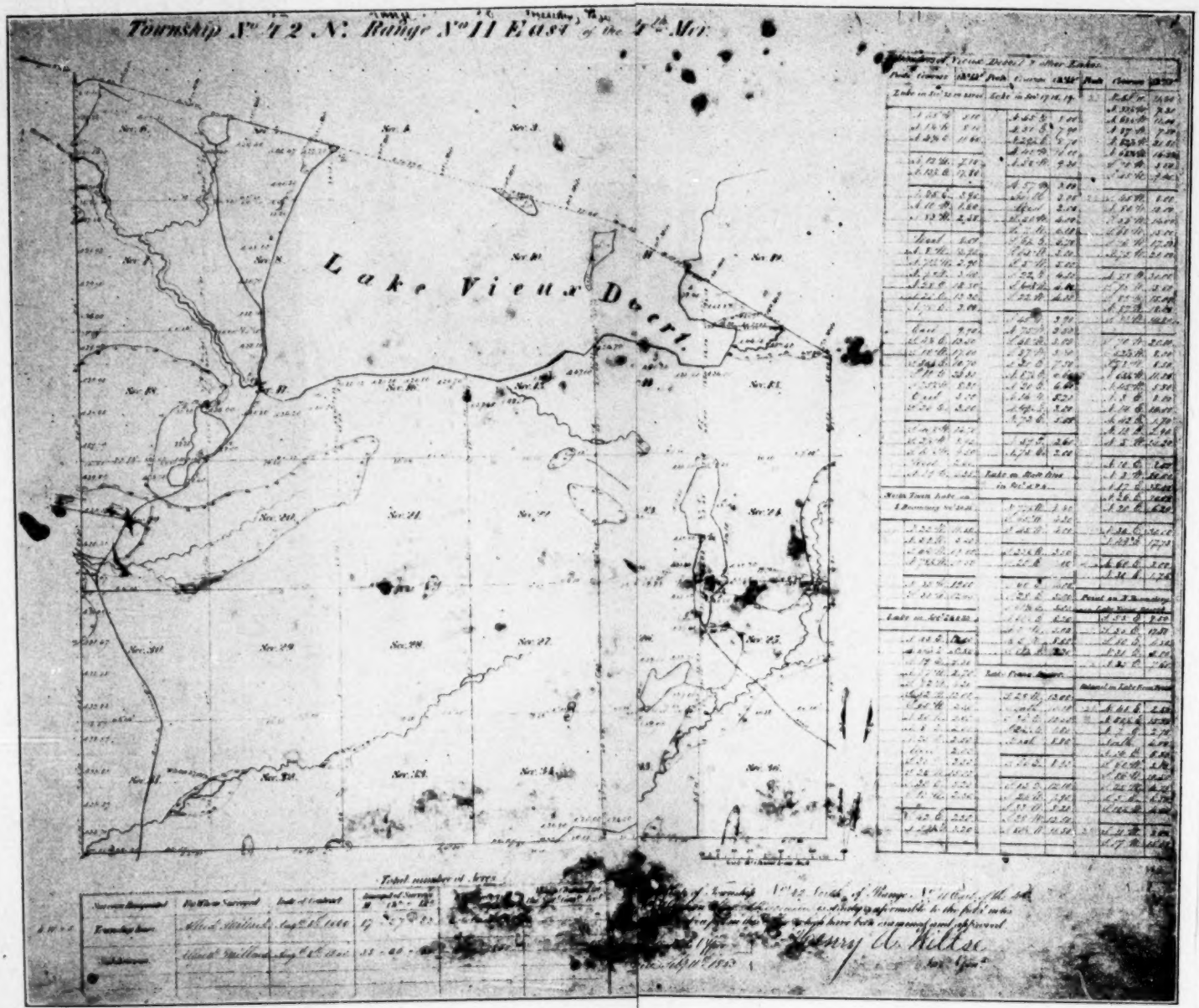


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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1925

ORIGINAL, NO. 19

IN EQUITY

---

STATE OF MICHIGAN,

*Plaintiff,*

v.

STATE OF WISCONSIN,

*Defendant.*

---

## BRIEF OF DEFENDANT STATE OF WISCONSIN

---

As appears from the complaint in this case, this is an action involving the entire northern boundary of Wisconsin from the mouth of the Montreal River on Lake Superior to the ship entrance from Lake Michigan into Green Bay, and the disputed area is divided into three different sections referred to in this brief as the Montreal River section, the Menominee River section and the Green Bay section. As to each a somewhat different claim is being made, and the facts supporting the theories of each party are entirely different.

## Divisions of Case

### a. Montreal River Section.

The Montreal River forms the western part of the boundary now in dispute, and from the headwaters of this river, as determined by Captain Cram, the first government surveyor sent to survey the boundary line, to Lac Vieux Desert and from thence to Lake Brule comprises the area referred to in this brief as the Montreal River section.

### b. Menominee River Section.

The area referred to as the Menominee River section involves the Brule River and the Menominee River. The territory in dispute is composed entirely of islands in these two rivers. It is the claim of Michigan that the main channel throughout the course of both these rivers is still the boundary line, and that the islands in these rivers should be assigned to the state in whose waters the particular islands happen to be situated, while it is the claim of the State of Wisconsin that because of a division of the islands between these two states made in 1846, whereby the islands above Quinnesec Falls were given to Michigan, and those below Quinesec Falls were given to Wisconsin, the boundary line should be so run as to give to Wisconsin all of the islands below Quinnesec Falls and to give to Michigan all islands above Quinnesec Falls.

### c. Green Bay Section.

In the Green Bay section of the boundary, Michigan claims that the islands referred to in the record as Chambers Island, Strawberry Islands, Rock Island, Washington Island, Detroit Island and Plum Island, as well as several other smaller islands, should go to Michigan on the theory that the most usual ship channel leading into Green Bay and through Green Bay followed close to the Wisconsin shore, and that all the

islands named are north and west of this channel. Wisconsin, however, claims that the channel intended by Congress was that leading into Green Bay north of Rock Island, and going down Green Bay so as to pass west of Chambers Island, thus giving her all the islands named, which she has governed, taxed and used since 1836–1840.

### Plan of Summary of Argument

The record in this case has been prepared on a basis of the foregoing division of the controversy, and the argument in this brief will follow the same divisions. Moreover, because of the tremendous amount of detail necessarily included in the record, and in order to present to the Court a short outline of the proof sustaining Wisconsin's theory of this controversy, we submit a brief summary of the various propositions upon which we rely. As every proposition is stated or a given line of testimony is referred to in the argument under this phase of the brief, it will be followed by a numeral. The numeral will refer to a reference at the foot of the page which in turn refers to that part of the main brief following this summary where there has been gathered together all the evidence sustaining the particular assertion, so that the Court can, when any particular proposition is stated, obtain a full statement of the testimony and other evidence relied upon to support this particular claim.

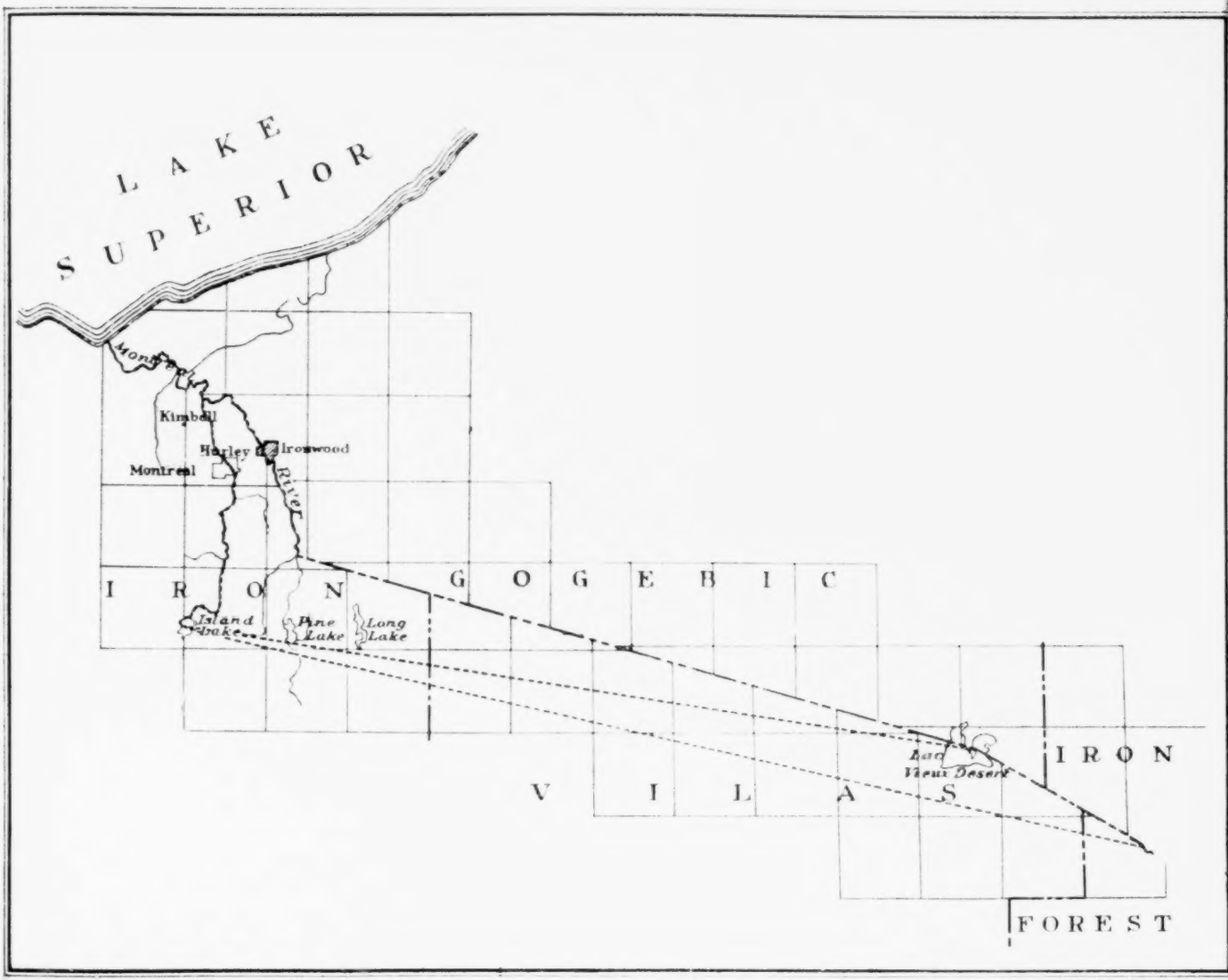
## SUMMARY OF WISCONSIN'S CLAIMS IN THIS PROCEEDING.

### OFFICIAL HISTORICAL BACKGROUND.

The Michigan boundary fixed by her statehood act was described as follows:

> "* * * thence through the middle of the main channel of the said River Montreal to the middle of the Lake of the Desert; thence in a direct line to the nearest headwater of the Menominee River; thence through the middle of that fork of said river first touched by the said line, to the main channel of the said Menominie River; thence down the center of the main channel of the same, to the center of the *most usual ship* channel of the Green Bay of Lake Michigan; thence through the center of the *most usual ship* channel of the said bay to the middle of Lake Michigan. * * * * * *" (Italics ours for purpose of showing difference in wording between Michigan Enabling Act and Wisconsin Territorial Act.)

The boundary of Wisconsin Territory established at substantially the same time was to all intents and purposes identical, except that in Green Bay it followed the main channel. Michigan now claims that when Congress said the main channel of the Montreal River should form part of the boundary, it did not intend the Montreal River, but intended the West Branch of the Montreal River, because, so she claims, the West Branch is the larger stream. She also claims that when Congress said the "Lake of the Desert" was to be one of the points in the boundary line, it did not intend to specify the lake that had theretofore been known by that name and by that of Lac Vieux Desert for over a century, but rather referred to a group of lakes and that in this group was Island Lake, then unnamed and un-




Outline sketch of "Montreal River Section," i. e. region be tween Lake Superior and Brule River, showing present boundary in heavy dash-dot line, and alternative boundaries claimed by Michigan in dotted lines.

known but forming part of a group of lakes known as Pine Wood Lakes, and situated sixty miles west of the country where the Lake of the Desert or Lac Vieux Desert is located.

In 1840 and 1841, after this boundary was so established, Captain Cram, representing the War Department, proceeded through the country and made a very extensive study of the boundary line for the purpose of ascertaining the boundary, and if possible tracing it out, from which he concluded that when Congress said the boundary should proceed up the main channel of the Montreal River to the Lake of the Desert, it understood that the Montreal River had as its source Lac Vieux Desert, or Lake of the Desert, as it had been described in that act. He found that Congress was in error.[1] Prior to this discovery, Douglass Houghton, the State Geologist of Michigan, had made the same discovery, and Lucius Lyon, who, as Senator-elect from Michigan when the boundary was fixed, was responsible for the particular boundary, had made a similar discovery.[2] In consequence of these various discoveries and by reason of reports made to her by Houghton and Lyon, Michigan, through her legislature, requested a more particular definition of the boundary, and representatives in Congress from Michigan introduced several measures with boundary definitions very similar to the Wisconsin definition to provide for a boundary that could properly be measured and determined upon the ground.[3] She also appointed Houghton as her special commissioner to accompany Cram on his second exploring trip along the line. Houghton and Cram agreed in the selection of the Montreal River and in the selection of the headwaters of that stream. These measures failed, however, until the Wisconsin Enabling Act was passed in 1846, and then Congress adopted the recommendations of Captain Cram

[1] Defendant's Brief, pages 53–55, 62–70.
[2] See Defendant's brief, pages 55–59.
[3] See Defendant's brief, pages 59–62, 78–80.

and the wishes of Michigan's representatives in Congress, and described this part of the boundary as follows, beginning at the mouth of the Menominee River:

> "Thence up the channel of said river to the Brule River; thence up said last mentioned river to Lake Brule; thence along the southern shore of Lake Brule in a direct line to the center of the channel between Middle and South Islands, in the Lake of the Desert; thence in a direct line to the headwaters of the Montreal River as marked upon the survey made by Captain Cram; thence down the main channel of the Montreal River."[4]

Captain Cram, having also reported that there were numerous islands in the Menominee River, and that it would be difficult to determine the channel with respect to such islands in many instances, recommended that these islands be divided by giving to Michigan the islands above Pemene Falls, and to Wisconsin the islands below these falls. Congress, in passing the Wisconsin Enabling Act, provided for a division of these islands on the same basis recommended by Captain Cram, but the place of division to be Quinnesec in place of Pemene Falls. The Enabling Act also contained the provision that the settlement of the boundary thus made was not to be binding on Congress unless accepted by Michigan by June 1, 1848.[5] No action was taken on the islands in Green Bay, and Wisconsin continued in possession of them from that time on down to the present day.

Almost immediately after the passage of this act, an appropriation was made for a survey and marking of the land boundary, and William A. Burt, a very able and reliable surveyor, surveyed and marked the boundary from Lake Brule to the headwaters of the Montreal River.[6] In 1848 Wisconsin was admitted as a state, with the aforesaid boundary, but without

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[4] See Defendant's brief, pages 61, 70–77, 80–82.
[5] See Defendant's brief, pages 80–82, 100.
[6] See Defendant's brief, pages 82–84.

any provision that the boundary was to be contingent on Michigan's acceptance of it.[7]

Michigan adopted this identical boundary line definition contained in the Wisconsin Enabling Act in her constitution of 1850, except that it did not include in its definition the words "as marked upon the survey of Captain Cram." The reason for this omission, we claim, was that after the Burt survey was accepted as complying with the survey of Captain Cram, its monuments and the calls thereof, and not the survey of Cram, governed, and that Michigan omitted these because unnecessary.[8] The constitutional convention of 1867 added these words, and the constitutional commission of 1873 did likewise. While neither of these constitutions were adopted, yet by their proceedings they showed that they intended to accept the Wisconsin boundary line definition exactly as it was contained in the Wisconsin Enabling Act, and thus is demonstrated the general acceptance and understanding of the Act.[9] From that time down to 1907 no further claim as to the boundary line was made by Michigan. In the latter year the constitutional convention adopted a new boundary line definition, the material parts of which are as follows:

> "Thence in a direct line through Lake Superior to the mouth of the Montreal River; *thence through the middle of the main channel of the West Branch of the Montreal River to Island Lake, the headwaters thereof;* thence in a direct line to the center of the channel between Middle and South Island to the Lake of the Desert; thence in a direct line to the south shore of Lake Brule." (Italics ours)

and this constitution was adopted by a vote of the people of Michigan.

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[7] See Defendant's brief, page 84.
[8] See Defendant's brief, pages 85, 99–103.
[9] See Defendant's brief, pages 86–89.

It will be observed that this definition, in place of describing the Montreal River as the boundary, describes the *West Branch* of this river as the boundary, and that it contains the words "Island Lake," which were never theretofore in the Michigan boundary line definition or in any other boundary definition. Apparently, at that time the theory that "Island Lake" was one of the Lakes of the Desert, as is asserted in plaintiff's complaint, had not dawned upon the representatives of Michigan, and so in order to follow the language of their original Act, they included the Lake of the Desert or as it is now commonly known, Lac Vieux Desert, and again accepted that land mark as an important part of her boundary.[10]

Thereafter, a boundary investigation was made by Prof. Davis for the Attorney General of Michigan, and he concluded that the river which Wisconsin claims as the proper boundary stream, i. e. the Montreal River, in place of the West Branch of the Montreal River, claimed by Michigan, was the proper course of the boundary.[11]

Following the filing of his conclusions, nothing was done on the boundary proposition until 1919 when a new boundary commission was established. This commission was instrumental in causing the present suit to be brought.

It is the claim of Michigan that the West Branch of the Montreal River is the main channel intended by Congress in the original boundary definition. Second, that Island Lake is one of the Lakes of the Desert, and that Captain Cram made a mistake in following what they call the East Branch of the Montreal River, though the so-called East Branch was in 1836 and for a long time theretofore and up to 1885 known as Montreal River and not as the East Branch. She also claims that she was not advised of the claims of Wisconsin, nor of her own rights, until 1907, and not fully advised until 1919.

---

[10] See Defendant's brief, pages 89–91, 99–108.

[11] See Defendant's brief, pages 91–96.

With respect to the islands in the Menominee River and Green Bay she claims that she did not know that she was entitled to a large part of them.

## BURDEN ASSUMED BY PLAINTIFF UNDER THE ALLEGATIONS OF HER COMPLAINT.

### Montreal River Section.

Reserving for later discussion the question of Michigan's acquiescence in the Wisconsin boundary line provisions and in the claims of Wisconsin in respect to that boundary, and discussing the issues raised by the complaint solely from the standpoint of the rights of Michigan to the territory now claimed during the years between 1846 and 1848, it is our theory that in order for Michigan to prevail in this case, she must establish by that high degree of proof required in proceedings of this kind, and which will hereafter be discussed, that so far as the Montreal River section is concerned, there was in 1836 a Montreal River following the course of the present Montreal River upstream to the confluence of the West Branch and the so-called East Branch of said river, and that from thence this well-known river proceeded along what is now known as the West Branch of the Montreal River. Moreover, Michigan must establish that Island Lake at the head of this branch was the Lake of the Desert referred to in the boundary line description. It will not be enough for Michigan to show that it was *one* of the Lakes of the Desert, because Congress had in mind a definite, commonly accepted Lake of the Desert, and for that reason Michigan, by proof, must establish that Island Lake was the lake intended by Congress.

Failing in this, she must establish that the Montreal River had no known course, and that it was unknown beyond its mouth, and that Captain Cram, representing the United States, and Douglass Houghton, representing the State of

Michigan, in making their investigations, either through absolute carelessness, ignorance or bad faith, failed to exercise any judgment or discretion in the selection of the stream mentioned as the main channel of the Montreal River, or in comprehending the intention of Congress in respect thereto; that the river they did select did not follow along the general course or line intended by Congress because of any of the reasons aforesaid, and that having thus failed, there never was any actual bona fide determination of the main channel of the Montreal River; that, moreover, the West Branch of the Montreal River actually was, at the time of their investigation, so evidently and apparently the Montreal River intended by Congress that no one exercising any degree of care or judgment whatsoever, would have selected the East Branch of the Montreal River. She cannot stop here, however, for according to her theory, the headwaters of that branch so selected must be the Lake of the Desert. She must, therefore, again absolutely and positively prove that Island Lake at that time was known as the Lake of the Desert, and that this fact was so commonly and generally known, that again it was not a question or subject for the exercise of discretion whatsoever, and further that Island Lake was the Lake of the Desert intended by Congress when it established the boundary line. Until Michigan meets that burden, she has not established her contention contained in her complaint. Michigan cannot prevail upon the theory that the boundary line definition *might* have been construed as she now claims it should be; she must show that there was *no other possible construction to be placed upon* it; in fact, that the description was not open to construction, either immediately after the passage of the Michigan Statehood Act or after the investigation made by Cram and Houghton.

**Menominee River Section.**

With respect to the islands in the Menominee River, Michigan must show again that at the time of Captain Cram's investigation, the matter of division of islands on a basis intended by Congress was so apparent that Captain Cram's investigation and report thereof must be held to have either been fraudulent or so erroneous as to be entirely disregarded, and that the situation with reference to the main channel of the Menominee River has not been changed in any respect whatsoever material to a proper division of those islands, and that the channel, as it existed in 1836, can now be determined with the same degree of certainty as would then have been possible. And, further, that Michigan never officially or otherwise changed her claim to a division of the islands on that basis.

**Green Bay Section.**

With respect to the islands in Green Bay, again Michigan must establish that the statement of Captain Cram that there were at least two channels down Green Bay, that is, one on one side of Chambers Island, and the other on the other side of Chambers Island, was entirely unfounded and false, and that the main channel or most usual ship channel down Green Bay lay east of Chambers Island, and that this fact was so apparent and so patently true that again as to it there was no doubt whatsoever, and that only absolute want of good faith or such lack of knowledge and comprehension of the actual existing facts as to amount to bad faith caused Cram to make this report, and that therefore his recommendation must be entirely disregarded. This same showing must be made by Michigan as to the islands at the entrance to Green Bay.

# ARGUMENT.

## MONTREAL RIVER SECTION.

### Michigan's Theory.

If the theory of Michigan is to be adopted, it will mean that Lac Vieux Desert or the Lake of the Desert, mentioned in the original boundary line description, included in the Wisconsin boundary line description, accepted as one of the points in the boundary line as laid out upon the ground by William A. Burt and adopted by Michigan in every constitution she has had since 1836, will be eliminated as one of the principal land marks in the boundary.

To support her theory of this claim, Michigan asserts that when Congress fixed the boundary as following up the Montreal River to the Lake of the Desert, and thence in a direct line to the headwaters of that branch of the Menominee River whose headwaters are nearest to the Lake of the Desert, it had in mind that there were numerous Lakes of the Desert and that one of these lakes was the source of the Montreal River; that in fact Island Lake was one of the Lakes of the Desert, and that, therefore, if Captain Cram, who made the original survey, had followed up the West Branch of the Montreal River to Island Lake, and had then run his line to Lake Brule, the boundary would have been established as Congress had originally intended it should be.

To adopt that theory is to convict Congress of a deliberate purpose to define an indefinite boundary to be determined on the mere accident of which of the group of lakes happened to be the headwaters of the Montreal, and to disregard the particularization of Congress when it used the words "*the* Lake of the Desert." This theory involves two primary propositions which Michigan has failed to establish in this suit.

First, that the West Branch of the Montreal was the river intended by Congress as the boundary.

Second, that Island Lake was one of the Lakes of the Desert.

**Evidence in Support of Issues Raised by Pleadings.**

To sustain her proposition, Michigan has offered testimony which she claims shows that the West Branch of the Montreal River is the larger stream. Wisconsin, however, has very definitely established that the Montreal River, or, as it is called in these proceedings, the East Branch is the larger stream; that it has always been accepted as the Montreal River intended by the original boundary definition, and that there is no basis for claiming the West Branch as the larger stream.[1]

It has also been shown that contrary to Michigan's contentions, the West Branch of the Montreal River was always known as a branch, or by its Indian name of Gogogashugun, while the East Branch, now so-called, was always known as the Montreal River;[2] that this situation was apparent from numerous maps available to and actually in the possession of the representatives of Michigan responsible for the boundary under which Michigan was admitted to statehood;[3] that from such maps, and the statements and correspondence of her representatives in Congress, it becomes apparent that the persons responsible for Michigan's boundary understood that there was one certain lake sometimes referred to as Lake of the Desert, but more generally identified as Lac Vieux Desert, which was to form part of the boundary line between Michigan and Wisconsin;[4] that these representatives at the time of the pass-

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[1] See Brief, pages 123–147.
[2] See Brief, pages 109–120.
[3] See Brief, pages 112–113.
[4] See Brief, pages 148–157.

age of the Michigan Statehood Act were under the impression that this lake was the source of the Montreal River; that Lucius Lyon, one of these representatives, made an investigation in 1839 and found that Congress was in error when it assumed that the Montreal River had Lac Vieux Desert as its source; and that he reported this fact to the representatives of Michigan.[5] Moreover, that Douglass Houghton, the first State Geologist of Michigan, made the same discovery and reported it to the Governor of Michigan, and that the Governor of Michigan procured the passage of a resolution to be presented to Congress advising Congress of the imperfections in the boundary.[6] This resolution was passed before Captain Cram, who made the first survey in the region to determine the boundary, reported his conclusions, and Captain Cram's conclusions supported the conclusions of Senator Lyon and Douglass Houghton. At the time of the passage of the resolution by the Michigan legislature, provision was also made for the appointment of the State Geologist as a commissioner, representing Michigan, to accompany a representative delegated by the United States in order that Michigan might know just where the boundary was, and that Michigan might know that the boundary was correctly laid out.[7] The State Geologist was appointed, accompanied Captain Cram's second expedition and agreed with the conclusions of Captain Cram reached in his original survey in 1840 and amplified in his investigations of 1841. These conclusions were that the Montreal River did not rise in the Lake of the Desert or Lac Vieux Desert, but that it had its source some sixty miles away from the Lake of the Desert; that by running a direct line from what Captain Cram and Houghton, as the Michigan boundary commissioner accompanying Cram, accepted as the headwaters of the Mon-

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[5] See Brief, pages 154–156, 57-59.
[6] See Brief, pages55–57, 59-62.
[7] See Brief, pages 61, 70.

treal River and identified by them as Astronomical Station No. 2, thence to Lac Vieux Desert, and from thence to the headwaters of the Brule, a boundary line could be established which would substantially meet the calls of the original Michigan boundary definition.[8]

Pursuant to these recommendations, the representatives of Michigan in Congress procured the introduction in 1842 and 1843 of two bills, neither one of which became a law, but both of which provided for a definition of the boundary substantially similar to the present Wisconsin boundary line.[9]

The Wisconsin Enabling Act of 1846 again adopted a definition, given above, practically identical with the definitions contained in the first two bills alluded to, and provided that the islands should be divided in accordance with the recommendations of Captain Cram, except that the division point should be Quinnesec Falls in place of Pemene Falls. The entire boundary thus defined was not to be binding on Congress unless accepted by Michigan within two years. In spite of this fact, however, Congress procured the survey and marking of this boundary, and admitted Wisconsin into the Union with these boundaries without any limitation making the boundaries conditional upon Michigan's acceptance thereof.[10]

Michigan in 1850 accepted these boundaries,[11] and from that time on down to 1907 no one ever denied or doubted that the boundary line was not only right, but that it was entirely satisfactory to Michigan. In that year a new Michigan Constitution was adopted, and it contained a definition providing that the boundary should follow the West Branch of the Montreal River to Island Lake, should

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[8] See Brief, pages 76–78.
[9] See Brief, pages 78–80.
[10] See Brief, pages 80–84.
[11] See Brief, pages 84–85, 99–108.

then run from Island Lake to Lac Vieux Desert and then to Lake Brule.

An engineer employed by Michigan in 1907 reported in 1909 that the so-called East Branch was the main channel and the proper boundary line stream, and from that time nothing further was done concerning the boundary until 1919, when the commission responsible for the bringing of the present suit was appointed.[12]

As has been said above, Captain Cram concluded that the so-called East Branch was the Montreal River. His conclusion was supported by Douglass Houghton, the Michigan commissioner. Every exhibit produced in this record demonstrates that the Montreal River was known as such far above the place where it is joined by the West Branch of the Montreal River, and that everybody familiar with that region prior to 1836 and 1841 knew of that fact.

Moreover, the testimony and exhibits in this case conclusively prove that Island Lake was not a Lake of the Desert, but was one of the Pine Wood Lakes, comprising an entirely different group of lakes than the Lake of the Desert or Lac Vieux Desert; that Island Lake was fifty to sixty miles west of the Lake of the Desert, accepted by Michigan and every other interested party from 1836 down to the commencement of this suit as one of the proper points in the boundary.[14]

The record demonstrates also that in order to adopt Michigan's claim in this suit, it will be necessary to disregard the assertions of Lucius Lyon, who was responsible for the boundary,[15] of Henry R. Schoolcraft,[16] who was in-

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[12] See Brief, pages 91–96.
[13] See Brief, pages 109–120.
[14] See Brief, pages 148–157.
[15] See Brief, pages 57–59, 84, 154–155, 114.
[16] See Brief, pages 155–156.

strumental in procuring it, of Douglass Houghton,[17] who helped to find it, of Captain Cram,[18] who found it, of the representatives of Michigan,[19] contemporaries of the above men, who attempted to settle the doubts and imperfections found in the boundary by proposing the boundary definition upon which Wisconsin relies, of William A. Burt, [20] who marked and surveyed the boundary, and of the people of Michigan,[21] who adopted the constitution of 1850 which contained a boundary definition identical in all important respects with the Wisconsin boundary definition.

These facts not only demonstrate that the boundary line was always accepted as correct, but also that it was satisfactory to Michigan; that she has been fully informed as to all material facts with reference to the boundary; and that Michigan was fully informed by able and influential representatives familiar with the boundary, while Wisconsin was not represented and took what was given to her.

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[17] See Brief, pages 55–57, 113.
[18] See Brief, pages 62–66, 71–77.
[19] See Brief, pages 78–82.
[20] See Brief, pages 82–84.
[21] See Brief, pages 84–85, 99–102.

## MENOMINEE RIVER SECTION

Michigan's claim is that this section of the boundary is now as it was described in 1836, i. e. the center of the main channel of the Menominee River, and that this Court must determine on which side of said channel each island is.

Wisconsin's contention is that all islands below Quinnesec Falls belong to her regardless of where the channel may be. She bases this contention upon the proposition that by the provisions of the Wisconsin Enabling Act of 1846, accepted by Michigan in her constitution of 1850, the original boundary was changed, Michigan taking all islands above Quinnesec Falls regardless of channel, and Wisconsin taking all those below Quinnesec Falls.

Captain Cram in his first report pointed out that there were a large number of islands in the Menominee River and that exact location of the channel with reference to them would be very difficult and provocative of uncertainty and disputes. He recommended that one State be given all islands below Pemene Falls and the other all those above said falls. In 1842 the Territorial Assembly of Wisconsin memoralized Congress to alter her boundary. In the same year Senator Porter of Michigan introduced a bill in the Senate to make the boundary more certain by giving Michigan all islands above Quinnesec Falls and Wisconsin all those below the falls, which bill passed the Senate but failed in the House.[1]

As originally introduced, the bill which in 1846 became the Wisconsin Enabling Act made no special provision with reference to the islands, but an amendment was adopted and became law, giving Wisconsin all islands below Quinnesec Falls. This amendment was introduced by Representative McClelland of Michigan, with the statement that it had been agreed upon between the congressmen from Michigan and the delegate

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[1] See Brief, pp. 66–68, 78–80, 289.

from Wisconsin. The Act as passed contained a proviso that the adjustment of boundaries should not be binding on Congress unless ratified by Michigan on or before June 1, 1848. On May 29, 1848, Wisconsin was admitted into the Union with "the boundaries prescribed by the act of Congress approved August 6, 1846," the reservation relative to Michigan's ratification being omitted.[2]

In 1850 Michigan adopted a new Constitution in which the boundary was described in substantially the language of the Wisconsin Enabling Act, omitting specifies reference to the islands.[3]

It is our position that the Wisconsin Enabling Act was a continuing offer of a new boundary, that Michigan's constitution of 1850 was an acceptance of that offer, and that therefore the boundary ceased to be the main channel of the Menominee River, and Wisconsin became entitled to all islands below Quinnesec Falls. We meet the suggestion that those islands were not specifically mentioned in the Michigan constitution of 1850 by the proposition that said constitution accepted as a unit the entire adjustment of boundaries proposed by the Wisconsin Enabling Act, notwithstanding omission to refer expressly to each part thereof.[4]

We point out that unless our contention prevails, Wisconsin must be held entitled to all territory between the Paint and Brule Rivers, because the Paint River is actually the headwaters of the Menominee nearest to Lac Vieux Desert, and hence the boundary fixed by Congress in 1836. Only by accepting our contention that the 1836 boundary has been superseded by that described in the Wisconsin Enabling Act, or our contention with reference to the binding effect of acquiescence, can Michigan retain the large and valuable territory between the Paint and the Brule.[5]

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[2] See Brief, pp. 80–82, 84, 289.
[3] See Brief, pp. 84–85, 289.
[4] See Brief, pp. 99–108, 290–291.
[5] See Brief, pp. 103–106, 290–291.

## GREEN BAY SECTION.

The sketch facing this page accurately represents the general geography of that part of the Green Bay region concerned in this suit, and shows by dotted lines the boundaries claimed by the parties. The territory in dispute embraces the following islands: Rock, Washington, Detroit, Plum, Chambers and the tiny Strawberries, and a few minor unnamed islands. Michigan asserts that the boundary runs east and south of these islands. Wisconsin contends that it passes to the west and north of them.

### The Boundary Description

The Michigan Enabling Act of June 15, 1836, described the Green Bay part of the boundary thus:[1]

> "Thence * * to the center of the *most usual ship channel* of the Green Bay of Lake Michigan; thence through the center of the *most usual ship channel* of the said bay to the middle of Lake Michigan"[2]

This is the controlling description and the italicized words are the controlling part of it.

The State of Wisconsin was admitted in 1848 with its boundary described as,

> "thence running with the boundary line of the State of Michigan through Lake Michigan, Green Bay, to the mouth of the Menominee River."[3]

### Wisconsin's Contentions

In support of her claim to the disputed islands, Wisconsin advances the following principal propositions:

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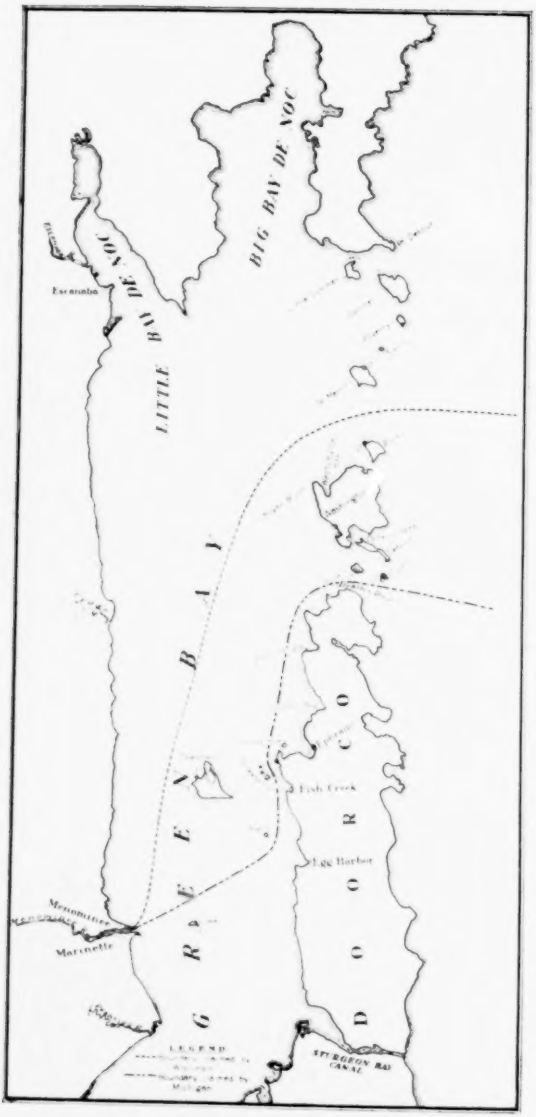
[1] 5 Stats. at L. 49.
[2] Italics ours.
[3] 9 Stats. at L. 56, 233.




Sketch of Green Bay section showing boundaries claimed by Michigan and Wisconsin. This sketch is printed on a larger scale in the supplement to this brief, Figure 19.

1. The channel west of Chambers Island and north of Rock Island was "the most usual ship channel" in and prior to 1836, and hence the boundary.

2. The intent of Congress was to use the phrase "most usual ship channel" as synonymous with "main channel." The channel west and north of the islands has always been the *main* channel, regardless of customary use by navigators.

3. Wisconsin has exercised dominion over the islands without interruption for eighty years, with the complete acquiescence of Michigan, the United States and the world at large. Therefore Michigan cannot now be heard to assert that Wisconsin's claims were originally ill-founded.

We shall discuss these propositions in order, (A) with reference to the northern group of islands, consisting of Rock, Washington, Detroit and Plum Islands, and (B) in connection with the southern group, i. e., Chambers Island and the Strawberries.

## A. ROCK, WASHINGTON, DETROIT AND PLUM ISLANDS

### 1. The Channel North of These Islands Was "the Most Usual Ship Channel" in and prior to 1836.

For convenience we shall refer to the channel north of the islands as the Rock Island passage; and to that south of the islands as Death's Door. The latter channel is named "Porte des Morts" on some of the maps.

To prove our contention that the Rock Island passage was the most usual ship channel in and prior to 1836, we rely upon a large variety of evidence, which may roughly be classified as follows:

1. Direct evidence that the Rock Island passage was the most usual channel in the '30s.

2. Evidence that the Rock Island passage is the wider, deeper, safer and easier.

3. Evidence that a number of travellers in the years preceding 1836 actually passed through the Rock Island channel, indicating that ships customarily went that way.

4. Data on lighthouses erected by the government, showing that the Rock Island passage, although safer than Death's Door, was the first one to be lighted, and hence must have been the one most used.

5. Direct evidence of the course taken by ships subsequent to 1850, showing that vessels plying between Green Bay and Mackinac customarily used the Rock Island passage, while those running between Green Bay and Chicago often went through Death's Door. This is supplemented by a very large body of evidence showing that in and prior to 1836 there was much commerce between Green Bay and Mackinac, but scarcely any between Green Bay and Chicago or other Lake Michigan ports, thus proving that on the assumption that the custom which has prevailed since 1850 was in effect in and prior to 1836, the most usual channel was nevertheless the Rock Island passage.

6. Evidence that in and prior to 1836 the vast bulk of the shipping was carried on by sailing vessels and that such boats require a wide channel because of the necessity of tacking when sailing against the wind. These facts increase the likelihood that Rock Island passage was the favored one in the early days.

We proceed to a brief outline of the proof on which we most rely. The evidence is discussed in detail in the main part of the brief.

### 1. Direct Evidence.[4]

We here rely principally upon two direct statements. The first one is found in a memorial submitted to Congress by

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[4] This topic is discussed in detail on pp. 158–166 of this brief.

thirty of the leading merchants and shipmasters of Detroit, in 1832.[5] The memorial requested the establishment of a lighthouse on Rock Island, and contains a direct recital that *"the ship channel in entering the Bay is on the North side of this Island."*

The other direct statement on which we principally rely is found in Douglass Houghton's manuscript notes of the geological survey of the Green Bay region made by him in 1839.[6] Houghton describes Rock Island, or Louse Island, as he calls it, and then sets forth that *"between this island and St. Martin's Isd. is the principal Ship Channel to Green Bay."* This note was made by Houghton in his official capacity as State Geologist of Michigan. It will be recalled that Dr. Houghton later served as Michigan's commissioner to adjust the boundary. In the light of these circumstances, his direct statement in the year 1839 is of the utmost weight.

We discuss in the detailed part of this brief a number of other bits of evidence which we have classed as "direct," but which need not be set forth at length here.[7] Most of them are maps on which the ship channel is shown passing north of Rock Island. We also call attention to the map attached to Captain Cram's second report, made in the year 1842, which shows quite clearly that Cram considered the islands to be in Wisconsin.[8]

### 2. Character of the Channels.[9]

There is a considerable amount of evidence in the record to the effect that the Rock Island passage is a relatively wide, deep, safe and easy channel, while Death's Door is narrow,

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[5] Brief, pp. 158–160.
[6] Brief, pp. 160–162.
[7] See pages 163–166 of this brief.
[8] Michigan Exhibit 23. The material part of this map is printed opposite p. 163 of this brief.
[9] This topic is discussed in detail on pages 167–174 of this brief.

rocky and exceedingly dangerous. To prove these characteristics, we have put in evidence oral testimony by Colonel Lawrence Martin, a well known geographer, and a considerable number of quotations from various navigators' guides, both official and unofficial, and from a History of Door County, Wisconsin, which describes various shipwrecks which have occurred in Death's Door. Cross-examination of a number of old sailors put on the witness stand by Michigan also brought out the great dangers of Death's Door prior to the days of lighthouses, buoys, bells, etc., and the relative safety of the Rock Island passage.

Of especial interest, in our opinion, is a diagram or profile which is printed in the supplement to this brief and which demonstrates graphically the greater width and depth of Rock Island passage, and the indisputable fact that that channel is the geographical and geological dividing line between the islands naturally attached to the Door County peninsula and those which must be considered geographically part of the Point Detour peninsula of Michigan.[10]

### 3. Course taken by Individual Travelers.[11]

This class of evidence would not be very persuasive were it not for the notable absence of similar evidence that early travelers passed through Death's Door. In this state of the record, we feel it significant that there appear several accounts of journeys prior to 1836 in the course of which the travelers actually sailed through the Rock Island channel.

The record discloses that in 1816 an army expedition of four vessels took the Rock Island passage into Green Bay;[12] that in 1821, the ship bearing General Ellis did the same;[13]

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[10] Supplement Figure 29. This profile is explained on page 167 of this brief.

[11] This topic is discussed in detail on pp. 174–179 of this brief

[12] Brief, pp. 174–176.

[13] Brief, pp. 176–177.

and that in 1834, the Episcopal missionary Kemper was conveyed through Rock Island passage on entering Green Bay and again on leaving it.[14] As somewhat similar evidence, we refer to a map and accompanying testimony showing that in 1832 steamboats from Detroit to Green Bay customarily passed by or stopped at an island north of Rock Island,[15] and to a report of a lighthouse inspector stating that in 1838 the writer obtained information about the Rock Island light by inquiry from mariners, indicating that his informants used the Rock Island passage, and saw the light close at hand.[16]

#### 4. Lighthouses.[17]

The record contains a considerable amount of lighthouse history. The first light in the entire region was placed on Rock Island in 1836, as a result of the Merchants' and Mariners' petition referred to above.[18] The light was located on Rock Island after careful investigation.[19] No light was installed in Death's Door until 1848, although the Door is a narrow and rocky passage which, if used as much as the Rock Island Channel, would undoubtedly have received the first attention because much more hazardous.[20] The government made a survey of the light requirements of the western lakes in 1837, and as a result of the express recommendation of the surveying officer placed the second lighthouse at the head of Green Bay instead of at Death's Door, the officer being of opinion that a light was not then sufficiently needed at the latter place.[21]

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[14] Brief, pp. 177–178.
[15] Brief, p. 178.
[16] Brief, p. 179.
[17] This subject is discussed at length on pp. 180–185 of this brief.
[18] Brief, pp. 180–182.
[19] Brief, p. 182.
[20] Brief, pp. 182–183.
[21] Brief, pp. 184–185.

**5. Course Taken by Ships After 1850—Commercial Development of the Country.**[22]

Michigan produced a considerable number of witnesses who testified that within their memory most of the vessels out of Green Bay passed through Death's Door. This evidence was objected to by Wisconsin on the ground of irrelevancy. We are willing to meet Michigan on her own ground, however. For this purpose, we brought out by cross examination of these witnesses the fact that their testimony concerned only ships plying between Green Bay and ports on southern Lake Michigan, and that ships operating between Green Bay and Mackinac have always customarily taken Rock Island passage.[23]

The testimony of these witnesses, together with a large amount of documentary evidence, fully establishes that within the memory of men now living the channel used by vessels has depended principally upon their destination, those plying between Green Bay and Mackinac using the Rock Island passage, and those between Green Bay and Chicago or other southern Lake Michigan ports using Death's Door in fair weather.[24]

We continue to maintain that the fact thus proved is irrelevant, because conditions changed markedly between 1836 and 1850, which is the earliest time to which the witnesses referred. The principal change arose from the placing of a beacon in Death's Door in 1848, thus very greatly reducing the dangers of that channel. The mere fact that large numbers of vessels went through the Door subsequent to the placing of the signal does not for a moment tend to prove that they did so before that time.

Assuming, however, although not conceding, that the same

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[22] These subjects are discussed in detail on pp. 185–240 of this brief.

[23] Brief, pp. 188–189.

[24] Brief, pp. 186–189.

custom prevailed in and prior to 1836, we emphatically dispute Michigan's conclusion that Death's Door was a usual channel at that time. For this purpose we have assembled a considerable mass of evidence proving that in and prior to 1836 there was much vessel traffic between the waters of Green Bay and Mackinac, and scarcely any between Green Bay and Chicago or any other Lake Michigan port.[25] Thus even upon the assumption that the present custom regarding choice of channels prevailed in 1836, the Rock Island passage must have been the most usual ship channel, because more vessels plied between Green Bay and Mackinac than between Green Bay and southern Lake Michigan.

Our evidence concerning the commerce between the various localities mentioned is voluminous and need not be discussed in this summary. Suffice it here to give the following short outline of our proofs:

a. In and prior to 1836, Green Bay and Mackinac were much more important commercial centers than Chicago or any other Lake Michigan port, and naturally, therefore, the bulk of the shipping was between the two localities.[26]

b. The Mackinac–Green Bay route was a link in one of the principal routes from the East to the upper Mississippi Valley, and a vast commerce passed between those points.[27] The record does not disclose that Chicago was at that time on such a trade route, and the court may take judicial notice of the historical fact that it was not. In any event, the burden is on Michigan to establish the contrary, and she has failed to do so.

c. An examination of actual statistics relative to customs' receipts, value of imports and exports, and number and tonnage of vessel arrivals, shows that there was more commerce

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[25] Brief, pp. 189–240.
[26] For discussion of evidence on this point see brief pp. 190–221.
[27] For discussion of evidence on this point see brief pp. 221–225.

between Green Bay and Mackinac than between Green Bay and any port on southern Lake Michigan.[28]

d. Green Bay's exports were not of a kind needed in Chicago or other southern Lake Michigan ports, and hence were probably not sent there.[29] The southern Lake Michigan ports had no exports worth mentioning until 1836, and none of their products could have been wanted in Green Bay.[30] Michigan has utterly failed to sustain her burden of proving that there was any interchange of commodities whatever between the ports. Under this head, particular attention is given to the lumber trade, for the purpose of showing that there was no such trade between Green Bay and Lake Michigan ports prior to 1836 or 1837.[31] Space is devoted to this matter because of the great amount of evidence introduced by Michigan relative to the lumber trade of later days, apparently to show a large vessel traffic between Green Bay and Chicago through Death's Door.

### 6. Type of Ships in Use Prior to 1836.[32]

Little proof is necessary in regard to this question. It is clear that in and prior to 1836 the overwhelming majority of vessels on the Great Lakes were sailboats.[33] It is also a matter of common knowledge that such vessels must resort to "tacking" in order to make progress against adverse winds. Tacking, which is the pursuance of a zigzag course, requires a wider channel than is necessary for steam navigation.[34] The Rock Island passage is about three times as wide as Death's Door, and hence must have been immeasurably better

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[28] For discussion of evidence on this point see brief pp. 225–232.
[29] For discussion of evidence on this point see brief pp. 232–233.
[30] For discussion of evidence on this point see brief pp. 233–234.
[31] For discussion of evidence on this point see brief pp. 234–240.
[32] For discussion of this topic see pp. 240–242 of this brief.
[33] Brief, p. 241.
[34] Brief, p. 242.

for purposes of sailing against adverse winds.[35] Being more desirable, the Rock Island passage was probably more used.

### II. Actual Understanding of Congress.

The record contains a considerable amount of evidence bearing on the actual understanding of Congress. We feel that what Congress meant is not material, for the reason that the Rock Island passage was clearly the most usual ship channel into Green Bay, and therefore the boundary description is unambiguous, and not subject to construction. However, if we concede for the purpose of argument that there is doubt upon that point, the boundary description becomes subject to a latent ambiguity, and resort may properly be had to evidence bearing on the actual understanding of Congress.

The principal fact which appears in this connection is that Congress considered the phrases "most usual ship channel" and "main channel" to have the same meaning, and to refer to the same channel.[37] At the same time when the Michigan Enabling Act was being considered by Congress a bill was pending for the establishment of a territorial government for Wisconsin. This bill was introduced somewhat prior to that which became the Michigan Enabling Act, and became law about two months before the latter. The Territory of Wisconsin as created by the above mentioned act was bounded in the Green Bay region as follows:

> "Thence through the middle of the main channel of Green Bay, to the middle of Lake Michigan,"

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[35] Brief, pp. 167–169.

[36] For discussion of this general topic see pp. 242–247 of this brief.

[37] The evidence in support of this conclusion is discussed on pp. 242–246 of this brief.

The fact that a bill bounding Wisconsin was before Congress contemporaneously with the bill bounding Michigan, and that both were considered and passed at substantially the same time, shows that Congress meant to confer upon one unit the same common boundary as that given to the other. It is inconceivable that there could have been any other intention. It must be plain therefore that the term "most usual ship channel" as used in the Michigan Enabling Act was meant to refer to the same channel as the term "main channel" in the Wisconsin Territorial Act. It is worthy of note that Lucius Lyon, Michigan's principal lobbyist for statehood, had the same understanding as Congress on this matter.[38]

The significance of the fact that Congress used the terms "main channel" and "most usual ship channel" interchangeably lies in the physical characteristics of the channels and their geographical location. A glance at any of the maps will show that the Rock Island passage is about three times as wide as Death's Door. The evidence shows clearly that the Rock Island passage is much deeper. There can be little doubt that it is, geographically and geologically speaking, the dividing line between those islands which are by nature closely allied to the Wisconsin mainland, and those similarly allied to the Michigan mainland. In this connection, we refer the Court particularly to the profile of the islands and channels which is printed as Figure 29 of the supplement.[39]

Upon this evidence there can be no question that the Rock Island passage is and always has been the main channel, regardless of the customs of navigators. Being the main channel, it is the channel which Congress meant to make the boundary.

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[38] See brief pp. 244–245.

[39] The profile is explained on p. 167 of the brief.

**Cram's Instructions.**[40]

When Captain Cram was sent to survey the boundary his superior officer directed him to determine the *best* ship channel into Green Bay.[41] Cram himself, in his first report, adopted the same interpretation of the boundary description.[42] Thus we have a practical construction of the Michigan Enabling Act by the government's engineers. There can be, of course, no doubt that the Rock Island passage is the best channel.[43]

**The Indian Treaty of 1836.**[44]

The record contains a contemporaneous interpretation by the United States government of the phrase "ship channel into Green Bay," which we think material. On March 28, 1836, less than three months before the Michigan Enabling Act became law, the United States entered into a treaty with the Ottawa and Chippewa Indians, by which the Indians ceded to the government a large tract of land in what is now northern Michigan, one of the boundaries of which was described in the treaty as "the ship channel into Green Bay."[45] Three years after the execution of this treaty, the government, in compliance with a Senate resolution, published an official map of the tract ceded by the Indians. This map plainly shows the Rock Island passage to be the boundary of the tract.[46] Thus, in 1839, the government's geographers considered the Rock Island passage to be "*the* ship channel into Green Bay"[47]

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[40] For detailed discussion of this topic see brief pp. 246–247.
[41] Brief, p. 246.
[42] Brief, pp. 68–69, 246.
[43] Brief, pp. 167–174.
[44] This topic is discussed at length on pp. 247–251 of this brief.
[45] Brief, p. 247.
[46] Wisconsin Exhibit 170, a part of which is reproduced in the supplement as Figure 23.
[47] Brief, pp. 248–251.

### III. Exercise of Dominion by Wisconsin, Recognition Thereof, and Acquiescence by Michigan.

We defer discussion of this matter until the consideration of the same question with reference to the other disputed areas involved in this suit.[48]

## B. CHAMBERS ISLAND AND THE STRAWBERRIES.

### I. The Channel West of These Islands Was "The Most Usual Ship Channel" in and prior to 1836.

The map shows that there are three possible channels in the Chambers Island neighborhood, one west of that Island, another between it and the Strawberry Islands, and the third between the Strawberries and the Door County peninsula. Michigan asserts that Strawberry Channel, which is the farthest east, is the boundary, while Wisconsin claims that the true line follows the channel west of Chambers Island. Neither party contends that the middle channel is customarily used at all, and the record establishes that it is highly dangerous and has never been a principal channel. In the discussion of the boundary in this vicinity, the middle channel will be entirely disregarded.

In support of our position in respect to these islands, we rely upon evidence which may be separated into the following classes:

1. Relatively direct evidence that the western passage was the most usual channel in the '30s.

2. Evidence that the western channel is the wider, deeper, safer and easier.

3. The history of lighthouses established by the govern-

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[48] The argument on the question of acquiescence is summarized on pp. 41–45 of this brief and is discussed in detail on pp. 307–337.

ment, showing that the western channel was the first one to be lighted, although Strawberry Channel is more dangerous.

4. Evidence of the course taken by ships in the years after 1850.

5. Evidence that in and prior to 1836 sailing vessels were in the overwhelming majority, and their need for room in which to "tack" rendered the western channel the more attractive to them.

### 1. Direct Evidence.[49]

The record contains but one or two bits of evidence of this class. In 1837 one Pendergrast, in the course of an official report on the needs of the western lakes relative to lighthouses, stated that Chambers Island was "exactly in the track of vessels."[50] A glance at any map will show that Chambers Island is not directly in the path of any vessel which might be using or heading toward Strawberry Channel. Therefore, the usual channel at the time of Pendergrast's report (1837) must have been that to the west of Chambers Island. That the same condition prevailed in 1832 is shown by a map of that date, on the margin of which Chambers Island and Green Island are listed as points on the principal steamship route from Detroit to Fort Howard.[51] Obviously, Green Island would not be a landmark for ships passing through Strawberry Channel.[52]

### 2. Character of Channels.[53]

There is much evidence on this matter and some of it is conflicting. It is clear enough, however, that the western

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[49] This topic is discovered in more detail on pp. 251–252 of this brief.

[50] Brief, pp. 251–252.

[51] Brief, p. 252.

[52] See any map.

[53] This topic is discussed at greater length on pp. 252–257 of this brief.

passage is about six times as wide as the maximum width of Strawberry Channel, and about eighteen times as wide as the minimum width thereof.[54] The western channel is about six times as deep as the eastern one.[55] The western channel is straight and Strawberry Channel is crooked. Several of Michigan's witnesses testified on cross examination that Strawberry Channel is dangerous, and one experienced navigator said that before the beacons were established, a man who did not know the eastern channel could not go through it.[56] One of the pilot's guides in the record warns strangers against passing east of Chambers Island.[57]

There is considerable testimony that Strawberry Channel is now considered safer for small pleasure craft than the western passage, because of the fact that the latter is more exposed to wind and hence more subject to rough weather, while Strawberry Channel is sheltered and well lighted.[58] This evidence is of course entirely irrelevant, for the conclusions drawn by the witnesses were based upon the use of vessels of a different kind than the ships of 1836, and upon the channels as they now are — fully lighted, marked and charted.

### 3. Lighthouses.[59]

The first light to be built in the vicinity was established on Green Island, near the mouth of the Menominee River, not later than 1853.[60] The Chambers Island light was built in 1868 on the northwest side of the island, where it could be of use only to vessels taking the western chan-

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[54] Brief, pp. 253–255.
[55] Brief, pp. 254–255.
[56] Brief, pp. 256–257.
[57] Brief, pp. 255–256.
[58] Brief, p. 264.
[59] This topic is discussed in some detail on pp. 257–258 of this brief.
[60] Brief, p. 257.

nel.[61] The Eagle Bluff light was erected about the same time. That the first light was put on Green Island is significant, because Green Island lies in the path of vessels sailing west of Chambers Island, but is far to the westward of those using Strawberry Channel.[62] The light could have been placed on Green Island instead of in the narrow, rocky Strawberry passage, only because more ships took the western passage.

**4. Course taken by ships after 1850—Commercial Development.[63]**

Under this head we first refer to two maps published in the years 1853 and 1865, which affirmatively show the only vessel route in the Bay passing west of Chambers Island.[64]

The record contains a very large amount of testimony relative to the channel taken by vessels within the memory of the witnesses. At first glance this evidence seems highly conflicting, but when examined more thoroughly the conflict is much diminished, by reason of differences in the type of vessels referred to by various witnesses, in commercial conditions existing from time to time, and in artificial protection in the channels.[65] All of the witnesses examined were put on the stand by Michigan, and several of them are fully discredited by their own testimony.[66]

As we read the reliable part of the testimony, the gist of it is substantially as follows: (1) Most of the commercial vessels have always gone west of Chambers Island, unless they had business to transact at the villages on the shore of the Door County peninsula; (2) Most of the commercial vessels which went through the Strawberry passage did

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[61] Brief, pp. 257–258.
[62] Brief, p. 257.
[63] These topics are discussed at some length on pp. 258–266 of this brief.
[64] Brief, p. 259.
[65] Brief, pp. 260–265.
[66] Brief, pp. 263–265, 384.

so for the purpose of trading at the villages near there; (3) Sailing vessels of the larger type (those drawing eight feet or more of water) especially preferred the west channel, because of its greater breadth and depth; (4) Light motor-propelled pleasure boats now in use prefer the Strawberry passage, because it is sheltered from the wind; (5) Before Strawberry Channel was lighted it was much less popular than now.

The evidence establishing the above propositions is discussed at length in the detailed portion of this brief, and need not further be referred to here.[67]

In view of the testimony that within the memory of men now living many ships have customarily passed through Strawberry Channel for the purpose of trading at the villages on the peninsula, we have collected some evidence establishing that those villages did not exist until after 1836, and that in and prior to that year there were no settlements whatsoever there, and hence no reason for vessels to pass through Strawberry Channel.[68]

### 5. Character of Vessels.[69]

Our argument here is the same as that made in connection with the other group of islands. The ships in use in the early days were sailing vessels and required a wide channel in which to tack against adverse winds. Strawberry Channel is narrow and difficult, if not impossible for such ships to navigate with anything but a favorable wind.[70]

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[67] Brief, pp. 260–265.
[68] Brief, pp. 265–266.
[69] This topic is developed on pp. 266–267 of this brief.
[70] Brief, pp. 256–257, 260–262, 267.

### II. Understanding of Congress

As we have pointed out heretofore, Congress used the term "most usual ship channel" interchangeably with "main channel," and Michigan's principal representative, Lucius Lyon, had the same understanding.[71] It is clear that the passage west of Chambers Island is the main channel, Strawberry Channel being merely a small subsidiary.[72]

There is also ample proof that the western channel is the *best* channel, and hence is the boundary within the practical construction placed upon the Michigan Enabling Act by the government's engineers.[73]

## ACQUIESCENCE BY MICHIGAN IN PRESENT BOUNDARY.

### AUTHORITIES RELIED UPON.

1. *Rhode Island v. Massachusetts*, 4 How. 591, 639 (1846).
2. *Missouri v. Iowa*, 7 How. 660 (1849).
3. *Missouri v. Kentucky*, 11 Wall. 395 (1871).
4. *Indiana v. Kentucky*, 136 U. S. 479 (1890).
5. *Virginia v. Tennessee*, 148 U. S. 503 (1893).
6. *United States v. Texas*, 162 U. S. 1 (1896).
7. *Oklahoma v. Texas*, 260 U. S. 606 (1923).
8. *New Mexico v. Colorado*, 267 U. S. 30 (1925).

### SUMMARY OF FACTS SHOWING ACQUIESCENCE.

#### Montreal River Section.

In addition to the proof heretofore outlined, Wisconsin has shown that Michigan has acquiesced in the present boundary,

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[71] Brief, pp. 29–30, 242–245.
[72] Brief, pp. 253–255.
[73] Brief, pp. 253–257.

that she has permitted the boundary to be marked and laid out;[1] that she adopted one constitution which defined the boundary line exactly as it is claimed by Wisconsin;[2] that she permitted lands to the northeast of this boundary line to be surveyed in Michigan with this boundary as the basis, and lands to the southwest to be surveyed in Wisconsin with this boundary line as the basis; that the township lines of these surveys do not join but are quite a distance apart;[3] that she made no claim to the lands until 1907, and then her claim was more in the form of a trading proposition than an actual assertion of a right;[4] that later her representatives investigated her claim and found her claim was without merit, and she again failed to take steps to assert her claim for twelve more years.[5]

Although Michigan now claims that Lac Vieux Desert was improperly made a part of the boundary, yet in 1907, by the adoption of her constitution, the people considered it was a necessary part of the boundary, and then added the West Branch of the Montreal River and Island Lake to the boundary description in defiance of the boundary line definition contained in her statehood act of 1836, and in her boundary definition contained in her constitution of 1850.[6]

In addition to this, as time passed on and Michigan made no claim of error in the boundary, the country along the boundary became settled as ownership of the lands was vested in private owners, taxation thereof began by Wisconsin, and since 1886 Wisconsin has collected taxes from the entire area in dispute.[7] The activity in real estate in this section has re-

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[1] See Brief, pages 80–84.
[2] See Brief, pages 84–85, 99–102.
[3] See Brief, pages 275–276.
[4] See Brief, pages 89–91, 273–283.
[5] See Brief, pages 91–96.
[6] See Brief, pages 89–91, 156.
[7] See Brief, page 276.

sulted in 78,612 transfers of land in the disputed area, which transfers do not include lis pendens, mortgages, satisfactions, etc., but refer only to actual sales and conveyances of title.[8] Highways were laid out, towns and counties were created, cities established, schools and school districts incorporated, business was adapted to the conditions thus gradually developed, settlement progressed in reliance upon the correctness of the boundary and Michigan's acceptance thereof; large investments in county buildings were made without any protest on the part of Michigan, mines were located, established and developed, some of them partly on one side of the West Branch and partly on the other, all in reliance upon the correctness of this boundary and of Michigan's acceptance thereof.[9]

The failure of Michigan to protest the boundary claimed by Wisconsin during this period, and her failure to assert any right in this territory until this late date, the defendant claims constitutes such acquiescence in the present boundary as to bar any claim Michigan might have made from 1846 to 1848.

**Menominee River Section.**

As to this section of the boundary we have established that all valuable islands below Quinnesec Falls were surveyed between 1854 and 1880 as being in Wisconsin.[10] The notes for these surveys were filed, approved and delivered to Wisconsin, the islands having been surveyed as being part of the section they were tied into, and described in accordance with the surveys on the Wisconsin mainland.[11] A large number of these islands have been continuously taxed by Wisconsin, taxation having commenced in 1859.[12] Sales and transfers have been

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[8] See Brief, pages 273–274.
[9] See Brief, pages 274–283.
[10] See Brief, pages 291–298.
[11] See Brief, pages 291–298.
[12] See Brief, pages 294–301.

recorded beginning with 1856, and range from two or three for a given description to as high as forty-four for a description.[13]

Michigan has previously conceded that we took possession of this land at least in 1846.[14] In at least one instance a Wisconsin sheriff successfully defied the Michigan authorities in 1879 in their attempt to prevent him from levying upon logs located on or near an island admittedly on the Michigan side of the main channel.[15]

As the country has developed, the forests have been removed from it, and the logs floated down this river. As a result of the natural changes in the river, the channel has changed in some instances. In others the channel has been changed by the acts of lumbermen in floating logs downstream. In still other instances logs have become lodged in the bottoms of the channels and have resulted in changes, all with the result that at this late date it is practically impossible to determine where the channel may have been in 1836.[16]

During the period since the last named date, numerous dams have been built which have obliterated channels in over thirty miles along the Menominee River and Brule River.[17] Ownership of property and development of the country in the vicinity of these islands has proceeded in reliance upon the correctness of the claims of Wisconsin.[18] If it should now be held that part of these islands properly belong to Michigan, the surveys will have to be cancelled, new surveys will have to be made, and the titles which have thus existed for fifty and more years will be destroyed. The owners who have paid taxes on these islands as far back as 1859 must take their chances in the scramble of new squatters, adventurers and

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[13] See Brief, pages 294–298.
[14] See Brief, page 294.
[15] See Brief, pages 302–303.
[16] See Brief, page 305.
[17] See Brief, page 305.
[18] See Brief, page 305–306.

claim jumpers that will follow such a decision. Endless litigation will result from such action.[10]

## Green Bay Section.

### Acts of Dominion by Wisconsin.[1]

The record contains evidence that as early as 1841 the Territory of Wisconsin taxed lands on Washington Island; that the State of Wisconsin has taxed lands on the islands since 1853 at least; that in 1855 the Town of Washington, consisting of all four islands of the northern group, was organized by special act of the Wisconsin legislature; that the State of Wisconsin took a census of the islands in 1855; that their inhabitants have voted at Wisconsin elections as early as 1858; and that the Adjutant General of Wisconsin drafted troops from the Town of Washington during the Civil War.[2] There are recorded in the office of the Register of Deeds for Door County, Wisconsin, 5,607 transfers of lands on Washington and Rock Islands, and 1,024 transfers of land on Chambers Island, all of which were made under the jurisdiction and laws of Wisconsin.[3]

It is accurate to assert that the State of Wisconsin has exercised complete dominion over all of the islands since 1860 at the very latest, with the exception of small tracts of land reserved by the United States for lighthouse purposes.

### Acts of Recognition by the United States.[4]

The United States has surveyed the land on the disputed islands as part of the public surveys in Wisconsin, and has

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[10] See Brief, pages 306–307.

[1] This subject is discussed in more detail on pp. 307–309, 331–332 of this brief.

[2] Brief, pp. 308–309, 331.

[3] Brief, pp. 309, 331–332.

[4] This topic is discussed in more detail on pp. 309–312, 332–333 of the brief.

never surveyed any part of the islands as part of the public lands in Michigan.[5] The islands were all designated for survey in Wisconsin as early as 1837.[6] Numerous maps published by the government show the islands as part of Wisconsin, and the record does not show a single instance in which the United States has considered them as being in Michigan.[7]

**General recognition.**[8]

Geographers and map-makers have for many years uniformly recognized the islands as part of Wisconsin. We have seen no map nor any document showing the islands as part of the State of Michigan or even indicating doubt on the question.

**Acts of recognition and acquiescence by Michigan.**[9]

Michigan has acquiesced in Wisconsin's assertion of dominion over the islands from the earliest day until the commencement of this suit, without exception. Indeed, there is reason to believe that the inclusion of the Green Bay islands in this lawsuit is in excess of the authority conferred by the legislature upon the Michigan officials in charge of the action.[9a] Official maps published by the State of Michigan in 1925 show the islands in Wisconsin.[10]

**Michigan's acquiescence is not excusable on ground of mistake.**[11]

As we understand Michigan's position, she concedes that Wisconsin has asserted dominion over the islands and that

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[5] Brief, pp. 310–311, 332–333.
[6] Brief, pp. 310, 332.
[7] Brief, pp. 310–311, 332–333.
[8] Discussed in more detail on pp. 312, 333 of the brief.
[9] Discussed in more detail on pp. 312–313, 333 of the brief.
[9a] Brief, p. 313.
[10] See Figures 33 and 34 of the supplement to this brief.
[11] This topic is developed in greater detail on pp. 313–331, 333–337 of the brief.

Michigan has uniformly acquiesced therein, but she seeks to avoid the binding effect of her acquiescence by contending that she has been misled or at least has been justifiably ignorant of her rights. Wisconsin asserts that Michigan has at all times been duly informed in the premises, and that she has no excuse whatever for her ignorance.

In support of our position, we show that Messrs. Henry R. Schoolcraft, Lucius Lyon and Douglass Houghton, three of Michigan's prominent men in the '30s, who were personally connected with the establishment or determination of the boundary, each had his attention called to the existence of more than one channel in Green Bay, and to the possibility of a boundary dispute.[12] Two of these men, Lyon and Houghton, were public officials of Michigan. We contend that their knowledge is the knowledge of Michigan, and binds the State.

Captain Cram's first report called especial attention to the existence of more than one channel in Green Bay and to the advisability of determining accurately which was the most usual ship channel.[13] This report was notice to Michigan.

In 1842 one Porter, who was United States Senator from Michigan, introduced a bill in the Senate to clarify the boundary by expressly placing the islands in Wisconsin.[14] This bill did not pass, but it shows the knowledge of Michigan officials relative to their rights.

Large amounts of money have been spent by the government in surveying the waters of Green Bay and there are and have been ever since the '40s accurate charts available showing the islands and the channels.[15]

All of Michigan's constitutions and proposed constitutions have contained the same description of the Green Bay bound-

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[12] Brief, pp. 314–316, 320–322.
[13] Brief, pp. 317–319.
[14] Brief, pp. 322–324.
[15] Brief, p. 310.

ary.[16] Even the constitution of 1907 made no change in its phraseology, although the question of a dispute with Wisconsin was before the convention, and other parts of the description were changed for the purpose of having influence upon a settlement with Wisconsin.[17]

As we have pointed out, the United States government has consistently surveyed the lands on the islands as part of the public surveys of Wisconsin and has never surveyed them in connection with the public surveys in Michigan.[18] This fact has been ample notice to Michigan that Wisconsin claims the islands, and that her claim is recognized by the government.

Lastly, we show that the disputed islands are populous and not without importance, and hence that Michigan cannot say she did not know of them.[19] Rock Island was settled in 1835; Washington Island in 1850, and Chambers Island before 1860. The present population of the islands is about 1,000. Practically every map in the record, from 1688 to the present day, shows the existence of islands at the mouth of Green Bay.[20] It is clear that everybody in Michigan in the last century who has known anything about geography must have known of the existence of the disputed islands and of the channels. For over half a century maps affirmatively showing the boundary as claimed by Wisconsin have been in circulation.[21] In this situation, Michigan surely cannot be heard to say that she has been misled concerning her rights. The Michigan Enabling Act has been a public record since 1836 and the description taken from it has been part of every Michigan constitution. Anybody knowing the boundary description and knowing that there are islands and more than one channel has had ample

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[16] Brief, pp. 325–328.
[17] Brief, pp. 325–328.
[18] Brief, pp. 310–311, 332–333.
[19] Brief, pp. 329, 336.
[20] Brief, pp. 328–330, 335–336.
[21] Brief, pp. 328–330, 335–336.

notice that there might possibly be a question which channel is the boundary, and has thus been put upon inquiry. It is idle, we submit, for Michigan to try to avoid the binding effect of her acquiescence.

## MICHIGAN ESTOPPED TO QUESTION WISCONSIN BOUNDARY.

### AUTHORITIES RELIED UPON.

1. *Clark v. United States*, 95 U. S. 539, 544 (1877).
2. *State v. Milk*, 11 Fed. 389, 397 (1882).
3. *United States v. Willamet Val. & C. M. Wagon Road Co.*, 42 Fed. 351, 359 (1890).
4. *United States v. Willamet Val. & C. M. Wagon Road Co.*, 44 Fed. 240, 241 (1890).
5. *United States v. Dalles Military Road Company*, 140 U. S. 599 (1891).

### SUMMARY OF FACTS SHOWING ESTOPPEL.

What has been said above goes only to the question of acquiescence, but the answer alleges and the proof establishes without contradiction that in reliance upon the boundary line as laid out and accepted by Michigan, numerous bond issues were floated by the City of Hurley, and by School District No. 1 of the City of Hurley and surrounding territory in Iron County, Wisconsin, all of which, under the Wisconsin constitution and statutes, required an irrepealable levy of a tax to be spread at large upon the real estate of the municipality benefited. The security back of these bonds was the property embraced within the respective municipal limits, and the assurance given by the proceedings which levied the tax that payment would have to be made. If this Court determines that Michigan is entitled to the City of Hurley, then the tax so lev-

ied will fall because no such authority exists under the laws of Michigan. Second, the bonds were not issued pursuant to the provisions of the Michigan statutes, but pursuant to Wisconsin statutes, and thus the bondholders will lose their security by destruction of the obligation to pay the money represented by the bonds.[1]

The school district bonds have been issued on the basis of the assessed value of the property on both sides of the West Branch within the school district. If the property east of the West Branch is withdrawn and given to Michigan, the total value of the remaining property of the district will be so reduced that the bond issue now outstanding against this school district will exceed 5 per cent of the assessed value of the remaining property, and under the Wisconsin constitution and statutes, the bond issue will be void.[2]

Again, this action will result in large and material loss to innocent persons who have not been made parties to this suit, and who can in no manner be protected by any decree rendered herein.

But the decree would strike even deeper than the mere material losses above described. Schools of the school district have been arranged in the light of the needs of the entire district, comprising territory on both sides of the West Branch, and high school facilities have been established only east of the West Branch because of the larger high school population in that section. This leaves the territory west of the West Branch without high school facilities. At the present time the schools in that territory are already overcrowded, and extensive additions to the school equipment are contemplated to provide not high school but grade school requirements. If the high school in the City of Hurley is taken out of this district, the pupils on the west side of the West Branch of the

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[1] See Brief, pp. 337–339.
[2] See Brief, pp. 339–340.

Montreal River will be without high school facilities. In addition, that territory will be without means to raise money to provide a high school because the bonded indebtedness outstanding will already exceed the constitutional limit of outstanding bonds as above set forth. It is needless to picture the hardship that would result to innocent parties if such a condition would be created. Yet, this entire situation is the result of Michigan's failure to assert any rights with respect to this territory until the present time. As between the innocent parties who have relied upon Michigan's conduct, and Michigan, who has made no claim to place anyone on guard, it is submitted that the State of Michigan should suffer, regardless of what her rights might have been in 1836 or 1848.[5]

## CONCLUSION.

Paraphrasing the language of this Court in *Indiana v. Kentucky*, 136 U. S. 479, we believe fairly states the situation as demonstrated by the facts in the present case:

> "But above all the evidence of former transactions and of ancient witnesses, and of geological speculations, there are some uncontroverted facts in the case which lead our judgment irresistibly to a conclusion in favor of the claim of Kentucky (Wisconsin). It was over seventy years after Indiana (Michigan) became a state before this suit was commenced, and during all this period she (Michigan) never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky (Wisconsin) has claimed the Green River Island (the area and islands in dispute) to be within her limits and has asserted and exercised jurisdiction over it (them), and thus excluded Indiana (Michigan) therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises? On

[5] See Brief, pp. 340–342.

the day she became a State her right to Green River Island (area and islands in dispute), if she ever had any, was as perfect and complete as it ever could be. On that day (Wisconsin's admission to the Union) according to the allegations of her bill of complaint (and the statement of counsel in the brief in opposition to the motion to dismiss) Kentucky (Wisconsin) was claiming and exercising, and has done so ever since, the rights of sovereignty both as to soil and jurisdiction over the land. On that day, and for many years afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal facts upon which the rights of the two states now hinge and yet she waited for over seventy years before asserting any claim whatever to the island (area and islands in dispute), and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. It is not shown, as he adds, that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls, or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenues.

This long acquiescence in the exercise by Kentucky (Wisconsin) of dominion and jurisdiction over the island (area and islands in dispute) is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky (Wisconsin), such omission to take any steps to assert her present claim by the State of Indiana (Michigan), can only be regarded as a recognition of the right of Kentucky (Wisconsin) too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority." (pp. 509–510).

## OFFICIAL HISTORICAL BACKGROUND OF CONTROVERSY

As appears by plaintiff's complaint, by an act of Congress approved January 26, 1937,[1] the State of Michigan was admitted into the Union and granted sovereignty over the territory described in her enabling act, which act was dated June 15, 1836,[2] with a northeastern boundary as follows:

> "* * * thence through the middle of the main channel of the said River Montreal to the middle of the Lake of the Desert; thence in a direct line to the nearest headwater of the Menominie River; thence through the middle of that fork of said river first touched by the said line, to the main channel of the said Menominie River; thence down the center of the main channel of the same, to the center of the *most usual ship* channel of the Green Bay of Lake Michigan; thence through the center of the *most usual ship* channel of the said bay to the middle of Lake Michigan. * *" (Italics ours for purpose of showing difference in wording between Michigan Enabling Act and Wisconsin Territorial Act.)

### Wisconsin Territorial Boundary.

The Territory of Wisconsin had been set off shortly prior to the Michigan Enabling Act by an act of Congress, approved April 20, 1836,[3] with a boundary exactly the same but described in reverse order as follows:

> "To a point in the middle of said lake (Lake Michigan) and opposite the *main* channel of Green Bay, and through said channel and Green Bay to the mouth of the Menominie River; thence through the middle of

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[1] 5 U. S. Stats. at L. 144.
[2] 5 U. S. Stats. at L. 49.
[3] 5 U. S. Stats. at L. 10.

> the main channel of said river, to that head of said river nearest to the Lake of the Desert; thence in a direct line, to the middle of said lake; thence through the middle of the main channel of the Montreal River, to its mouth; thence with a direct line across Lake Superior. * * *" (Italics ours to indicate difference in wording of Wisconsin Territorial and Michigan State boundary definitions.)

The bill of complaint filed by the State of Michigan contains some brief accounts of the factors which lead to the division of Michigan Territory in this way and an explanation of the reasons for the description of the boundary that is found in these statutes.[1] However, prior to the passage of the final enabling act, several bills had been introduced in both houses of Congress for the purpose of settling the northern boundary of Ohio along the proposed state line of Michigan, Ohio claiming a larger territory than Michigan was willing to concede to her. On December 11, 1834, a bill to establish the northern boundary of Ohio was referred to the judiciary committee of the United States Senate, which heard elaborate arguments considering the rights of the State of Ohio and the proposed State of Michigan. Mr. William C. Preston of South Carolina, a member of the committee, contended that if a straight line was to be run due north through the middle of Lake Michigan, Wisconsin would get entirely too much territory, and thereupon produced a map similar to the Judson map, later published by order of the legislative assembly of Wisconsin, which indicated that the Montreal and Menominie Rivers both rose in Lac Vieux Desart, and contended that would be a fair division of the territory. This division, however, was opposed by delegate Lucius Lyon of Michigan, and from December, 1834, to March 1, 1836, several bills and amendments were introduced, until on the last

[1] Complaint, pps. 2, 3.

date, a select committee was appointed to consider this boundary line controversy. This committee reported in favor of Ohio and against Michigan, but gave to Michigan the upper peninsula with the boundary above described in a report submitted on March 22, 1838.[5]

"December 11, 1834, a bill to establish the northern boundary of Ohio was referred to the judiciary committee of the United States Senate, of which William C. Preston of South Carolina was a member. Both Ohio and Michigan being represented before the committees by counsel, elaborate arguments were made on the proper interpretation of the fifth article of the ordinance of 1787, particularly as to the clause establishing a line running due east and west from the southern bend of Lake Michigan, as the southern boundary of the fourth and fifth states to be formed out of the Northwest Territory. It *was incidentally argued that as Michigan was to be the fourth state* to be thus erected, the fifth state, Wisconsin, when it came to be established, should embrace all that portion of Michigan Territory lying west of the meridan of Mackinaw and the middle of Lake Michigan. (Wis. Hist. Colls., IV., p. 352 Wisconsin Exhibit 29). At the conclusion of the argument, Mr. Preston asked how much territory lay west of Lake Michigan. The reply was that there were probably one hundred thousand square miles, although it had not yet been surveyed. Mr. Preston expressed the opinion that this was altogether too large a tract for one state, and produced a map which was similar to one drawn by L. Judson, and in 1838 published 'by order of the legislative assembly of Wisconsin.' This map was supposed to be the most accurate extant, but it erred greatly in many important particulars. It represented the Montreal and Menomonee rivers as meeting in Lake Vieux Desert, thus making an island out of the northern peninsula. Mr. Preston now drew a finger along this

[5] Northeastern Boundary by Thwaites, Wis. Hist. Coll. vol. 11, 469–485 (1888) Wisconsin Exhibit 29.

alleged river highway between Green Bay and Lake Superior and remarked that he 'thought that would be a fair division of the country.'

Delegate Lucius Lyon of Michigan protested against this, saying that his people 'did not wish to so extend their state; that for a great part of the year nature had separated the upper and lower peninsulas by impassable barriers, and that there could never be any identity of interest or community of feeling between them.' (Id. p. 353 Wisconsin Exhibit 29.)

The view taken by Senator Preston, however, appears to have been regarded by a majority of his fellow committeemen as a sound one. At all events, it was just then very desirable, politically, to conciliate Ohio and yet keep good friends with Michigan, who would soon become a member of the Union. So the territorial claims of Ohio were favorably reported upon by the committee, and it was informally agreed among the members that Michigan should have the northern peninsula. To be sure, Michigan did not want it, but it was prophesied that she would eventually be satisfied with the enforced exchange.

The same Ohio boundary bill came again before the senate judiciary committee, the following session; for though the senate had passed it the previous year, the house had not acted. On the 1st of March, 1836, the committee once more reported in favor of Ohio. Mr. Preston having reiterated his views regarding the Michigan–Wisconsin boundary line. The committee, in its report, after disposing of the question actually before it, went outside of its topic and submitted this suggestion to the senate: (Senate Docs. No. 211, 24th Cong. 1st Sess. Vol. 111; also Reports of Coms., No. 380, Vol. 11, 1835–36, Wisconsin Exhibit 29.)

'If Michigan be not sufficiently large, it is easy to remedy that objection; and if the ordinance (of 1787) is to remain unchanged—*as it must, unless the state of Virginia will consent to an alteration of it*—so immense a tract of country as Wisconsin presents ought not to be formed into a single state. Whatever disadvantage may arise from connecting with Michigan, a portion of

country west or north of the lake, is, we think, not to be weighed with the inconvenience of subjecting, forever after, to the jurisdiction of a single state, all the inhabitants who may reside in the region west and north of the lake.'

About this time the state constitution adopted by the people of Michigan in 1835 was, together with a message from the president on the Ohio–Michigan boundary dispute, referred to a select senate committee, of which Thomas H. Benton was chairman and John M. Clayton, chairman of the judiciary committee, a member. This committee reported March 22, 1836, a bill to establish the northern boundary of Ohio as Ohio wanted it, and also a bill to erect Wisconsin Territory. This latter measure laid down the northeast boundary line of the new Territory as Mr. Preston had suggested and practically as it exists today."[9]

Congress erroneously believed that the Montreal River had its source in the Lake of the Desert or Lac Vieux Desert, as most maps at that time referred to this particular lake. Contrary to the statement made in paragraph 5 of plaintiff's complaint, the public records now available show that this error was not discovered until shortly prior to the time of the survey made by Captain Thomas Jefferson Cram, and that this mistake was verified by Cram and reported to Congress.

**Boundary survey provided for by an appropriation of Congress which required that the boundary line be "surveyed, marked and designated."**

By an act of Congress, approved June 12, 1838[10] Congress directed that said boundary be correctly established and a boundary line be "surveyed, marked and designated," and directed the making of a plat or plan of the boundary between

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[9] Wisconsin Exhibit 29.
[10] 5 U. S. Stats. at L. 234

the State of Michigan and the Territory of Wisconsin. Between the time of the passage of this act and 1840, nothing was done on this survey. However, as a result of a considerable amount of correspondence between representatives of Michigan in Congress, directed first to the President of the United States, and then to various departments,[11] a new appropriation was made by an act approved July 20, 1840, and the superintendence of the survey of such boundary was placed under the war department. Captain Cram was directed to take charge of the survey provided for by the Act of July 20, 1840, by the war department through its bureau of topographical engineers. The first trip to the territory in question was made in the summer of 1840, in pursuance of these two acts. The survey was not completed in that year, however, and a further appropriation was passed by Congress and approved on March 3, 1841.[12] This appropriation bill stated that the purpose of the expedition was "a survey and examination of the country situated between the mouths of the Menomonie and Montreal Rivers."[13]

On July 30, 1840, instructions were given by the war department to Thomas Jefferson Cram to make the survey.

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[11] Wisconsin Exhibit 44. Complaint, p. 6.

[12] Complaint, par. 10, p. 16.

[13] That bill provided in part as follows: "That for the purpose of designating and marking the boundary line between the State of Michigan and Territory of Wisconsin, agreeably to the true intent and meaning of the second section of the act entitled, 'An act to establish the northern boundary line of the state of Ohio, and to provide for the admission of Michigan into the Union, upon the conditions therein expressed', there be, and is hereby appropriated, the sum of six thousand dollars, to be expended under the Secretary of War, in the survey and examination of the country situated between the mouths of the Menominee and Montreal Rivers, who is hereby directed to cause to be made a plat or plan of such survey and examination, which shall be returned to Congress with all convenient dispatch."

These instructions provided that the part of the boundary described as follows:

> "Thence through the middle of the channel of the River Montreal to the middle of the Lake of the Desert; thence in a direct line to the nearest head of the Menomonee;"

should be surveyed, and continuing:

> "The line from the head of Montreal River to the head of the Menominee must also, of necessity, be surveyed as it is an undetermined line without distinct physical characteristcs.
>
> This line, it is said, must pass through Desert Lake. Recent information induces the belief that there are several lakes, between the head-waters of these two rivers, called Lakes of the Desert. They are so delineated and named on some maps of that locality which I have examined. The survey will, however, give correct information on this subject."[14]

**Houghton discovered impossibility of boundary before Cram did and advised Michigan authorities.**

Shortly prior to the time that Captain Cram received his instructions to proceed with this survey, Douglass Houghton, state geologist of Michigan, and next to Henry Schoolcraft probably the best informed man of his time concerning conditions in that country, made one of his earliest official expeditions to this country for the purpose of getting general information as to its geology. On this trip he stopped at the mouth of the Montreal River and then proceeded to the settlement at La Pointe. This was about July 16, 1840.[15] On July 22, 1840, just two days after the passage of the act providing for the second appropriation for the survey and designation of the boundary, and eight days prior to the date of Captain

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[14] Complaint, pps. 6, 7. Plaintiff's Exhibit 14, p. 2.

[15] Journal of Douglass Houghton, Library of Univ. of Michigan, p. 250, Wisconsin Exhibit 7.

Cram's instructions from the war department, Houghton wrote to William Woodbridge, then governor of Michigan, as follows:

"As a subject which must, if not soon arranged, cause our state much contention, I would call your attention to the condition of the boundary line between our state and the territory of Wisconsin. I have long known this boundary to be extremely defective, but a more close examination has shown it to be even worse than had been supposed. I have not the act which defines our boundary before me, and, therefore, cannot refer very minutely to it, but this will probably be sufficient to refer to the fact that the geography of the country is totally different from that exhibited by the map which was used in defining the boundary, and this difference is such that if the letter of the act be strictly followed, Michigan will be the loser by several hundred square miles and the country lost will embrace a portion of the most promising of the mineral district, as well as much that is favorable for the purposes of agriculture. The boundary as defined crosses itself once and perhaps twice; Lac Vieux Desert which in the act is called the head of the Montreal River is in reality the source, or rather one of the sources of the Chippewa River and very far separated from the Montreal River (the latter being a very short stream which has its source in the mountainous district bordering upon Lake Superior), the result of which is there is no boundary between the lake alluded to and the head of the Montreal River. * * * I have alluded to this subject at this time rather to call your attention to its importance than to point out its imperfections. Our citizens are disposed to look upon this district as worthless, and will, I am satisfied, be disposed to consider a few hundred miles of little importance, but the fact is that country is as much wronged as Michigan was when the whole soil was considered a continuous swamp. The agricultural capabilities of this portion of our state very far exceeds what is commonly supposed, its mineral resources are very considerable and added to this are the fisheries of immense importance. Some of the most active and influen-

tial men of Wisconsin are to a certain extent aware of these facts, and they are also aware there is difficulty of defining our boundary line, but not fully to the extent of that difficulty. If the final arrangement of this boundary line be left until it be understood by the people and until Wisconsin is admitted to her place among the states, Michigan will not only have trouble in arranging it, but she will also be in the end the party which will suffer."[16]

Some time during the latter part of July, between July 14th and August 1st, 1840, Bela Hubbard, a prominent surveyor, who conducted extensive surveys in the Upper Peninsula of Michigan, and who from time to time assisted Douglass Houghton in his work, was at the mouth of the Montreal River and describes the extent to which the portage from the mouth of the Montreal River to Lac du Flambeau was used at that time;[17] this region being quite generally known to fur traders and persons dealing with them in that vicinity. These traders used as their headquarters La Pointe, at which place Lucius Lyon, hereinafter referred to, made his investigations with reference to the boundary line.

**Lucius Lyon also concluded boundary as defined in Michigan Statehood Act of 1836 an impossible one before Cram discovered fact.**

Prior to that time and on February 17, 1840, Lucius Lyon had written to Hon. H. D. Turner, a member of the House of Representatives of the State of Michigan, advising him of the results of an investigation made by Lyon while acting as a special representative of the Indian department at La Pointe in 1839, and therein expressed, first of all, his view of the understanding of Congress as to the proper boundary definition,

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[16] From Original Letter in Burton Historical Collection, Detroit, Mich. Plaintiff's Exhibit 16.

[17] Wisconsin Exhibit 361.

and also the fact that contrary to the understanding of Congress, when the boundary was first established, it now appeared that the Montreal River did not have the Lake of the Desert as its source. He said:

> "Having, when in Congress, when the limits of Michigan were about to be unjustly curtailed on the south, first proposed and taking an active part in the extention of our boundary in the northwest so as to embrace a large tract of country on the south side of Lake Superior, the principal object of my enquiry was, of course, to ascertain the character and value of the country thus added to our state. The result of these enquiries were, I am happy to be able to say, far more favorable than I had ever anticipated. * * * The Montreal River, before mentioned, is the west boundary of the country above described. It divided Michigan from the territory of Wisconsin, and according to Farmer's Map of Michigan and Wisconsin, has its source in 'Lac Vieux Desert.' This representation on the map, however, I believe to be erroneous, for I learned from persons well acquainted with the country that Lac Vieux Desert empties itself and forms the head of the Wisconsin River, and that the Montreal River at the point of its nearest approach to that lake is at least 70 to 80 miles distant from it. It is, therefore, probable that a question of some importance may hereafter arise between Michigan and Wisconsin in relation to this boundary, and I mention this subject here that the legislature may be apprised of it."[18]

It thus appears that there had been presented to the officials of Michigan from two authoritative and official sources the situation as to the boundary which was supplemented by a report of geologist Houghton, under date of December 17, 1840, as a preliminary report on his labors of the summer before. In this report he stated that the boundary as defined "is absolutely impracticable." He advised, however, that by filling up

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[18] Vol. 27, Mich. Hist. Coll. 1896, letter No. 14, Series No. 5, Wisconsin Exhibit 22.

some "vacancies which exist, a boundary might be made very nearly in accordance with the original intent of the framers of the act."[19]

The nature of his work in that region is illustrated by his journal which describes his investigation along the Montreal River and shows a sketch of certain investigations made inland from the mouth of the Montreal River in 1840.[20]

**Houghton and Lyon Reports prompted Resolutions of Michigan in respect to the Boundary.**

Apparently the reports of Douglass Houghton and probably Lucius Lyon impressed upon the public officials of Michigan the importance of settling the boundary issue as quickly as possible, and accordingly, on January 12, 1841, Governor Woodbridge by special message to the legislature said in part:

> "Since the month of August last, I have been aware that serious difficulties might be apprehended in the location of the boundary line between this state and the territory of Wisconsin. A strict adherence to the terms in which that boundary is sought to be defined by the act of Congress entitled, 'An act to establish the northern boundary line of the state of Ohio and to provide for the admission of the state of Michigan into the Union upon

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[19] Plaintiff's Exhibit 47, p. 7.

"The region of country which has been traversed during the past season has been such as to bring him frequently upon the boundary line between our state and the Territory of Wisconsin, and after an examination of the subject, so far as circumstances would permit, my former impressions are fully realized, that the boundary as defined is absolutely impracticable.

By giving to other lakes and streams the same names as those contained in the act of Congress, and filling up some vacancies which exist, a boundary might be made very nearly in accordance with the original intent of the framers of that act. This subject is an important one to the interests of Michigan and most assuredly deserves early attention."

[20] Wisconsin Exhibit 7, Journal August 13 to August 18.

conditions therein expressed,' would seem, by information more recently communicated to me by the state geologist to be absolutely impracticable. * * *

A critical examination of the topography of the country through which the line must pass, appears to render a strict and literal conformity with the directions contained in the act of Congress, impossible; but the general intent of the act, it is presumed can be attained without much difficulty if early and appropriate measures be taken. In order that the nature of the difficulties I allude to may be more fully before you and more readily seen, I respectfully present to you the last communication I have received on the subject from the state geologist; (for whose vigilance in detecting them at so early a period I feel much indebted) and have also requested him to cause to be prepared by the state topographers for your use, a diagram or a general sketch of the country through which the line must pass; and which, though in some respects conjectural will nevertheless present with sufficient certainty the disagreements that exist between the description contained in the act of Congress and the actual geography of those regions."[21]

On January 22 and 23, 1841, again, apparently, pursuant to the recommendations of the governor of Michigan, the Michigan legislature passed a joint resolution reciting the discrepancies in the boundary in somewhat similar language to that used by the governor, and directed the appointment of the state geologist or some other suitable person as commissioner, who with a similar commissioner of the United States, should mark and establish the boundary in accordance with its true intent.

"Whereas a critical examination of the topography of the country through which the boundary line between this State and the territory of Wiskonsin must pass, appears to render a strict and literal conformity with the directions contained in the act of Congress establishing

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[21] Plaintiff's Exhibit 17.

the same impossible: And whereas the general intent of said act, it is presumed, can be attended without much difficulty, if said line be immediately marked and described: therefore—

Be it resolved by the Senate and House of Representatives of the State of Michigan, that the Congress of the United States be, and they are hereby earnestly solicited to cause the line in question to be surveyed and marked; and that, simultaneously with the survey, a commissioner be appointed by the General Government to attend, conjointly with a commissioner to be appointed by this State, and who, by their concurrent action, (shall) so establish the boundary in question, if practicable, as shall be in conformity with the manifest general intent of the act of Congress.

Be it further resolved, that the delegation of this State in Congress be, and they are hereby, requested, to use their efforts to procure the passage, in Congress of some appropriate act or joint resolution to effect this object.

* * *

Signed by the Speaker of the House of Representatives and President of the Senate and Governor Woodbridge."[22]

They also passed the following resolution:

"A joint resolution authorizing the Governor to appoint a commissioner to act in concert with such commissioner as may be appointed by the Federal Government for the purpose of surveying and marking the boundary line between this State and the Territory of Wiskonsin.

Resolved by the Senate and House of Representatives of the State of Michigan that the Governor be, and he is hereby, authorized to appoint the State Geologist, or some other fit and proper person, as commissioner to survey and mark the boundary line between this State and the Territory of Wisconsin, to act in concert with such other commissioner or commissioners as may be first appointed for that purpose by authority of the Government of the United States."[23]

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[22] Plaintiff's Exhibit 20.

[23] Plaintiff's Exhibit 20.

This resolution was submitted to Congress on February 15, 1841.[24]

**First Cram report submitted subsequent to resolutions of Michigan Legislature.**

On February 3, or about ten days after the passage of the resolution above referred to, Captain Cram's first report of his investigation made pursuant to the act of July 20, 1840, was published and transmitted by the President, in which he reported the situation with reference to the boundary substantially the same as it had been previously reported by Lucius Lyon and state geologist and boundary commissioner Houghton, as above set forth.[25] From this, of course, it is apparent that the allegations of pages 15 and 16[26] of the plaintiff's bill of complaint are entirely negatived by the official records which the plaintiff has produced in this case.

**Captain Cram's first report fully presented a correct analysis of the intent of Congress and the facts which he found by his investigation.**[27]

In this report Cram stated:

> "On a careful reading of the foregoing description of the boundary, it will be inferred:

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[24] Plaintiff's Exhibit 19.

[25] Plaintiff's Exhibit 15.

[26] "That following the said report by said Captain Cram of his work and relying on the representations made in said report as to the impossibility of locating said boundary in accordance with the provisions of said act of Congress of June 15, 1836, the general assembly of Michigan passed a joint resolution reciting. (Resolution of Michigan Legislature, Plaintiff's Exhibit 22, quoted in part.)

Provision was also made by the said general assembly of Michigan for the appointment by the Governor of such commissioner in behalf of the state, and for the presentation of the resolutions to Congress, and the said resolutions were duly presented to Congress. Senate Document, page 186, 26th Congress, 2nd Session, Vol. 4, 1840–1841."

[27] Sen. Doc. 151, 26th Cong., 2nd Sess., Vol. 4. Plaintiff's Exhibit 15, p. 4.

1st. That Lake of the Desert was supposed, in the act of Congress, to be a head-water of, and to discharge itself into, Montreal River; for the words in the description are, 'thence through the middle of the channel of the said River Montreal, to the middle of the Lake of the Desert.'

2d. That somewhere between Lake Superior and Green Bay, there was a known lake bearing the name 'Lake of the Desert'; for the language describing the boundary specified that the 'middle of the Lake of the Desert' shall be a point in the boundary.

3d. That of all the head-waters discharging themselves into the Menomonee River, one would be found nearer to the said Lake of the Desert than any other; for the description says, 'thence in a direct line to the nearest head of the Menomonee River';

4th. That the nearest head of the Menomonee to the said lake would be found to be a branch of the Menomonee and not a lake; for the description reads, 'thence through the middle of that fork (branch) of the said river just touched by the said line, down the centre of the main channel of the same', etc.

The four suppositions here enumerated were doubtless made by the committee of Congress who draughted the description of the boundary, and predicated on information derived from a map similar to one entitled, 'Map of the entire Territories of Wiskonsin and Iowa, published by order of the Legislative Assembly of Wiskonsin, by L. Judson', and which was supposed to present a more accurate delineation of the waters between Lake Superior and Green Bay than any other map extant.

An exact copy of as much of said map as is necessary for illustration is attached to this report, and marked No. 1.

Upon this map, it will be perceived that the boundary between Michigan and Wiskonsin is laid down as following a direction from Lake Superior nearly southeast to Green Bay; and that the courses of the Montreal and Menomonee rivers, taken together, constitute a general route in the same direction; and that Lac Vieux Desert (Lake of the Desert) is not only represented on this map as be-

ing the head of the Montreal, but is likewise represented as the head of the Menomonee."

Captain Cram, in this report, made clear the fact that Congress was in error in assuming that the Lake of the Desert was the source of the Montreal River, for his investigation disclosed that the Montreal River had its source many miles away from the Lake of the Desert, and, accordingly, he said:

"Now, although the map from which No. 1 has been copied bears the high sanction of a legislative assembly, it is proven by the survey that that portion of this map upon which the boundary is laid down is exceedingly erroneous; and, therefore, if it be true that this map, or one similar to it, was taken as a guide in draughting the description of the boundary, it is not surprising that the said description, so far as it relates to the head-waters of the Montreal and Menomonee, is so worded that the conditions of the act defining the boundary cannot be complied with, to the full extent of all the requirements contained in said act. (P. 4)

It was ascertained that Lac Vieux Desert, or 'Lake of the Desert,' has no connexion whatever with the Montreal river; and that the nearest distance between said lake and this river is such, that an Indian requires eight days, without a pack, to pass from one to the other: and it is also believed, with much confidence, that the Montreal river does not head in a lake, but takes its rise in an extensive swamp. Neither is Lac Vieux Desert, or 'Lake of the Desert', at all connected with the Menomonee river; but this lake was found, contrary to the opinions of all except the Indians, to be the principal head of the Wiskonsin river.

The Montreal river was found to have a course different from what was supposed; so have the courses of the Menomonee, and of its principal branches, been equally mistaken and misrepresented. (P. 5.)

Again: from the course which the Montreal river is not found to have, and from the fact that Lake of the Desert has no connexion whatever with this river, it will also be perceived that it would be impossible to run a line

according to the meaning of the words in the description of the boundary, 'thence through the middle of the channel of the said river Montreal, to the middle of the Lake of the Desert.' It is true, that the channel of the river might be followed to its very head, and from this head a line could be run over the ground to the middle of the Lake of the Desert; but it is not presumable that such a random line was ever intended by Congress to constitute any portion of the boundary in question. It was undoubtedly supposed that the Lake of the Desert was the head of the Montreal; and that a natural boundary would be found to be provided all the way from the mouth of the Montreal to the middle of said lake; and that it would only be necessary to mark out a line from the middle of this lake to the nearest head-water of the Menomonee river.

* * *

From the foregoing discussion of the route, it will now appear that it would be exceedingly difficult, yea, utterly impossible, to run the boundary line in complete accordance with the present reading of the description in the act of Congress; particularly on that part of the ground between the Montreal river and the head of the Menomonee (the Brule river) which comes nearest to 'Lake of the Desert.' And from all the circumstances of the case, it is evident that another action of Congress will be required in relation to this boundary, to the end of *defining* it in such a manner that it can be established either upon the ground, or laid down on a map, with that degree of definiteness which should always characterize a boundary line between two States."[28] (P. 6)

As a result of his observations and investigations, Captain Cram suggested that the boundary could be defined with greater certainty by adopting methods of description which were made possible by his investigation, and whereby Lac Vieux Desert or Lake of the Desert, as it had been called in

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[28] Sen. Doc. 151, 26th Cong., 2nd Sess., Vol. 4. Plaintiff's Exhibit 15, pps. 4, 5, 6.

the boundary line description, could be included in the description so as to carry out the intent of Congress and attain the purposes intended by Congress.

> "There is no doubt of Lac Vieux Desert (as written on the map, and generally so called) being the identical lake with that which seems to have been intended in the description of the boundary, and therein called 'Lake of the Desert', and whose middle is made one point of the boundary.
>
> The three islands of this lake have, from their relative positions, been named South island, Middle island, and North island.
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> Lac Vieux Desert, now being known, might be brought into the boundary, by specifying some point within the periphery of the lake for one physical point of the boundary. All indefiniteness, much labor, and expense, would be avoided by simply saying, in the law, that the highest point of ground (whether of earth or rock) upon Middle island shall be the point, instead of saying 'middle' of the lake."[28]

His first report also contained recommendations with reference to defining the middle of the channel of the streams mentioned in the boundary description, and also raised the question as to the definition of the islands in the Brule and Menomonee rivers. With reference to this subject, he said:

> "The present description of the boundary makes the 'middle of the channel' of the Montreal river a part of the boundary. The term 'middle of the channel' is indefinite, because islands may occur, which would of course cause more than one channel. By specifying which channel in such cases shall be followed by the boundary-line, another ambiguity would be avoided. It is also evident, that it should be specified how far up the Montreal the boundary shall extend, before leaving for Lac Vieux Desert. For example: the law might specify that the boundary, in

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[28] Sen. Doc. 151, 26th Cong., 2nd Sess., Vol. 4. Plaintiff's Exhibit 15, p. 7.

ascending, shall follow the extreme right-hand channel, from the mouth of the river, up to where it shall be found to be intersected by a straight line drawn from the highest point of Middle island, to some specified point of Montreal river. Such a description would be divested of vagueness, and would allow of this portion of the boundary being established at comparatively less cost.

As the shortest line from said point on Middle island to the nearest water flowing into the Menomonee would probably terminate in a swamp (see map No. 3,) it would be well to say that this part of the boundary shall be a direct line from the highest point of Middle island to the middle of the channel of the outlet of Lac Brule; thence through the middle of the Brule river, etc.

The 'centre of the main channel' of the Menomonee river is made a part of the boundary. This river contains numerous islands, and consequently more than one channel where these islands occur. It will be impossible in many of these cases to know which is the 'main channel', without minute surveys. In many cases it was tried, and found impossible to decide by a simple inspection or reconnoissance which was the 'main channel.' It should also be remarked here, that the term 'main channel', applied to the multiplicity of channels of the Menomonee, would be somewhat ambiguous in any event; for, it may be asked, is the main channel the widest channel of the river, or is it the deepest? If it be the widest or deepest now, will it be the widest or deepest hereafter? or shall the main channel be that through which the greatest quantity of water shall be found to pass at the time of the survey? And if it should occur that two channels at the same island pass equal quantities of water, which would then be regarded as the boundary? These questions are sufficient to show the indefiniteness of the term 'main channel.' There are also a few islands in the Brule river, to which similar questions might apply, in reference to the term 'main channel.'

To avoid all ambiguity in reference to these channels, it might be specified in the act defining the boundary, that, in descending the stream, the boundary shall follow the extreme left-hand channel of the Brule, and the ex-

treme right-hand channel of the Menomonee, down to a well known point of the river—say, Pe-me-ne falls; and thence to follow the extreme left-hand channel of the remainder of the Menomonee to its mouth. Such a division would leave some of the islands in Michigan, and the remainder in Wisconsin, and would avoid much expense in minute surveys to ascertain the 'main channel', and would leave no indefiniteness upon this part of the boundary. The free use of either channel for the purposes of navigation would, from an established principle of law, be open at all times to the citizens of either State, and the islands would be nearly distributed in equal proportions between the two States."[20]

His report also dealt with the ship channels in Green Bay, and therein he discussed the fact that there were possibly two such channels. Again, his report fully presented that situation, and as plaintiffs in their complaint allege, the report came to the attention of the legislature of Michigan. He said that:

"After descending the channel of the Menomonee 'to the centre of the most usual ship-channel of the Green Bay of Lake Michigan', the boundary is made to run 'thence through the centre of the most usual ship-channel of Green Bay, to the middle of Lake Michigan.'

From map No. 4, which accompanies this report, it may be inferred that the islands which are in the eastern part of Green bay would cause several ship channels. It is a well-known fact to all who have any personal knowledge of the navigation of this bay, that there are at least two ship channels, which are in use by all classes and kinds of craft that navigate the great lakes. It would be next to an impossibility to collect the testimony that would be necessary to decide the question, which of these is the 'most usual ship-channel of Green Bay?' And it is not easy to conceive any other mode (than by testimony) by which the 'most usual ship-channel' could be ascertained.

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[20] Sen. Doc. 151, 26th Cong., 2nd Sess., Vol. 4 Plaintiff's Exhibit 15, pp. 7–8.

> But suppose this method of collecting testimony practicable: it might occur that all the evidence that could be obtained on the subject would prove that one of these channels is just as much in use as the other; in which case, it would only be shown that there is no such thing as the 'most usual ship channel' in this part of the bay."[31]

From this report it became evident that the boundary line, as described by Congress, could not be followed literally because of the erroneous information of Congress in respect to the source of the Montreal River, and that with respect to the islands in the Menomonee River and in Green Bay some uncertainty existed. His report shows clearly that as a result of the investigation, a latent ambiguity in this description of the boundary had developed, and such ambiguity having been discovered by him, he thought it fitting and proper to make recommendations to Congress which would enable Congress ultimately to fix a specific, readily determinable boundary line which would carry out the intent of Congress. This was only natural when it is considered that Congress thought its original designation of a boundary was so indefinite and uncertain that it would have to be marked out, surveyed and outlined. As a result of his investigation, Captain Cram concluded that his recommendations, if adopted, would carry out the spirit of the Michigan Statehood Act "without material difficulty." Thus he said:

> "Such a description as this, if authorized by Congress, would allow of the boundary being established without any material difficulty; and it would cause no material departure from what is conceived to have been the intention of the law as it is now worded. The proposed description would moreover leave the State of Michigan and the Territory of Wiskonsin with nearly the same relative quantities of territory as they would have respectively possessed had the Montreal, and the Menomonee, and Lac

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[31] Sen. Doc. 151, 26th Cong., 2nd Sess., Vol. 4. Plaintiff's Exhibit 15, p. 8.

Vieux Desert, been found situated as was supposed in framing the present law of the boundary. Besides, the field operations, which will be necessary to establish the boundary, would be attended with much less expense, on account of having to make no minute surveys of the islands (and consequent channels) in the Montreal, Brule, and Menomonee rivers."[32]

**Cram's second investigation authorized**

As a result undoubtedly of the petition of the Michigan legislature and the report of Captain Cram, Congress passed the act of March 3, 1841.[33]

Douglass Houghton had also been appointed special commissioner, representing the State of Michigan, to accompany Captain Cram on his second expedition.[34] The second expedition proceeded in two sections, one up the Menominee River from its mouth, that is, in a northwesterly direction; the other down the Montreal River from its mouth, that is, in a general southeasterly direction, in order that he might obtain what his instructions directed him to obtain, that is, "a correct delineation of the country between the headwaters of the Me-

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[32] Sen. Doc. 151, 26th Cong., 2nd Sess., Vol. 4. Plaintiff's Exhibit 15, p. 9.

[33] 5 U. S. Stats. at L. 435. Act of March 3, 1841, sec. 3:

"And be it further enacted, That for the purpose of designating and marking the boundary line between the State of Michigan and Territory of Wisconsin, agreeably to the true intent and meaning of the second section of the act entitled: 'An act to establish the northern boundary line of the State of Ohio, and to provide for the admission of the State of Michigan into the Union, upon the conditions therein expressed,' there be, and is hereby appropriated, the sum of six thousand dollars, to be expended under the direction of the Secretary of War, in the survey and examination of the country situated between the mouths of the Menominee and Montreal rivers, who is hereby directed to cause to be made a plat or plan of such survey and examination, which shall be returned to Congress with all convenient dispatch."

[34] Wisconsin Exhibit 26, Wisconsin Exhibit 7.

nomonee and Montreal Rivers, so that all matters requisite to determine a boundary between these two points can be laid before Congress."[35] He was also required to obtain a correct survey of these two rivers.

**By Captain Cram's second report Congress was finally supplied with complete and correct information upon which to lay out a correct boundary line in accordance with the true intent and purpose of the original boundary line definition contained in the Michigan Statehood Act.**[36]

### Division of Cram Party

Cram's second report outlined his investigations made in the summer of 1841. He described the progress of the work made by the party proceeding upstream along the Menomonee River by calling attention to the fact that their first attempt lead them to the Ontonagon River instead of the Montreal.[37] The party that proceeded upstream from the mouth

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[35] Sen. Doc. No. 170, 27th Cong., 2nd Sess., p. 2. Plaintiff's Exhibit 23.

[36] Sen. Doc. 170, 27th Cong., 2nd Sess., Vol. 3. Plaintiff's Exh. 23.

[37] Sen. Doc. 170, supra, pp. 2–3.

"Accordingly, the survey of this intervening district was commenced at Lake-vieux-Desert (see map No. 1), the place where the operations stopped in the autumn of 1840, and was extended in the direction as nearly as could conveniently be ascertained, toward the head-waters of the Montreal.

After reaching what was supposed to be those head-waters, the line of the survey was carried down stream to Lake Superior, when it was discovered that the Ontonagon, and not the Montreal, had been reached; and thus it was conclusively proven that the head-waters of the Montreal were to be found a very considerable distance further toward the west than had formerly been supposed. And the evidence of this circumstance was very much strengthened by having discovered, the year before, that Lac-vieux-Desert was the head of the Wisconsin, which was known to run toward the south, instead of being, as was formerly supposed and represented on the maps, the head of the Montreal."

of the Montreal River was again divided into two sections at least. One party followed the ancient trail or portage leading from the Mouth of the Montreal River to Long or Portage Lake, and thence to Lac du Flambeau. The other party followed up the river by canoe. In the latter party was Douglass Houghton, state geologist and special commissioner, representing the State of Michigan, who, in his journal, describes his observations as he proceeded up the Montreal River.[38]

Arriving at the mouth of the Montreal River on July 20, 1841, from the first crossing of the Montreal River by the ancient trail above referred to, Captain Cram proceeded along the portage trail, and Houghton, with two voyageurs, and a small bark canoe, proceeded by the river.[39]

### Journals Showing Progress of Party

About July 25, Houghton had proceeded upstream as far as the mouth of Hemlock Creek, which has been identified in the record as being the west branch of the Montreal River, as it is now known. He described this creek as being 40–50 feet wide at its mouth, and then proceeded on up the stream.[40]

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[38] Douglass Houghton Journal, Wisconsin Exhibit 7.

[39] Wisconsin Exhibit 7.

"July 24. Crossed so much of the Montreal portage as lies between Lake Superior and the first crossing, being 11 pauses. Left Mr. Douglas with Mr. Woodside to complete the examination of Montreal River—Captain Cram with three men continued on the portage while I with two voyageurs and a small bark canoe proceeded up the river."

[40] Wisconsin Exhibit 7.

"July 25. Embarked at 5½ o'clock A. M. and proceeded up this river. Passed the mouths of several small streams (creeks) coming into the river from the west. Among these Hemlock Cr. is 45–50 feet wide at its mouth, the country conditions much as yesterday, soil good loam, with maple and hemlock, etc. The river is an almost unbroken torrent, with a bed chiefly made up of boulders—which are sometimes of a large size and mostly trap and altered rock. I noticed pebbles of agate, both loose and in the

By July 27 he had proceeded up the Montreal River to the point where the present Pine River and Lehman's creek, referred to in the complaint, join. These streams he referred to as the Gros Pin and Sapin Rivers, and in referring to them he does not state that he called these rivers by those names, but the inference rather is to be drawn that those names were common to those streams prior to his arrival in that region. This fact is emphasized by the statement of Captain Cram in his report, to which further reference will be made, wherein he says that these streams were "called Balsam and Pine Rivers."[41] Houghton entered into a considerable description of the vicinity of the junction of the two aforesaid streams and concludes that "the junction of the Gros Pin and Sapin rivers may be considered as the head of the Montreal River or its source must be in one of those two rivers."[42]

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cells of the altered rock, together with zeolite, datholite, calespar, etc.

In consequence of the stream being chocked with flood wood, we were compelled to make two portages of about 1 pause each and at 4 o'clock P. M. commenced a portage of 6 pauses, the portage being over a 2d range of hills from Lake Superior. My men took the canoe forward on the portage while I made some examinations. Often bowlders in the bed of the stream near my place of encampment. These bowlders almost wholly of altered rock and are more than usually filled with trappon minerals.

Ascending the Montreal river, from my place of encampment the direction is S. E. or E. S. E. and the stream is exceedingly crooked.

Estimated distance traveled 13 miles."

[41] Plaintiff's Exhibit 23, p. 3.

[42] Wisconsin Exhibit 7, July 27, 1841.

"Rain with thunder during the night—Embarked at an early hour and proceeded to the junction of the Gros Pin and Sapin rivers and thence 3 pauses near to the Montreal portage where I found Capt. Cram encamped at 100 pauses from lake Superior.

The Montreal river from the 2d range of hills to the junction of the two streams mentioned receives but few tributaries and those are of small size and mostly from the west and these

From the accompanying map found in the journal and enlarged as Wisconsin Exhibit 103, the courses of the Cram and Houghton parties are shown and the headwaters are designated on the map by a cross near the words "Camp Astronomical, Lat. 46° 18′ 18″, Long. 90° 24′ 38″. As shown by his notes, Houghton met Captain Cram near this point and spent several days in making astronomical observations. The evident meaning of this, of course, is that

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streams appear to be chiefly the drainage of marshes—The forks at the junction of the Gros Pin and Sapin rivers may be considered as the head of the Montreal river or its source must be in one of those two rivers. The two streams mentioned are two mere creeks 40 to 60 feet over and of nearly equal size but I should think the river Sapin to have somewhat the largest amount of water. The Gros Pin is the stream farthest south and the lake forming the source of this may be considered as the head of the Montreal River.

From our place of encampment to the fork, the Montreal river is a succession of rapids over bowlders of granite rocks and dead water through low alder swamps. The country is evidently a succession of low irregular knobs of granitic rocks which may be said to commence where the last trap was noticed in the river. The granite bowlders are mostly a light color rather fine grained and chiefly made up of quartz and feldspar. The knobs mark the country on the Montreal river between the Riv Gros Pin and Riv Sapin and no doubt can exist but granitic region constitutes a large proportion of the entire summit country. The general direction of Montreal river ascending from its mouth to Gros Pin riv is very nearly S. E. The soil of the granite region so far as examined is a light sandy loam inferior to that of the trap district, but nevertheless it will admit of advantageous cultivation.

Capt. Cram represents the granite to commence on the Montreal portage at little meadow 2 miles south from Middle river and that it is here mostly composed of feldspar and quartz.

Wild rice Tirama aquatica is of frequent occurence in the upper parts of Montreal river though not in very great abundance.

Saw an abundance of partriges (ruffed grouse) and pigeons and numerous cuttings of beaver. Capt. Cram mentions having seen red sandstone at Middle river and at sundry places in the valleys between the knobby hills."

all parties considered this point as a very important point in the ultimate delineation of the boundary, and were, therefore, careful in making proper observations. On July 28 Lieutenant Webster, who had charge of that part of the Cram party which proceeded up the Menomonee River, arrived with his party at the point where the observations were being made, and Houghton verified Cram's report to the effect that Webster's party had first proceeded up the Ontonagon River under the impression that it was the Montreal River.[43] Houghton also examined the vicinity of the two rivers above referred to and apparently did not change his original conclusion that the head of the Montreal River might be said to be the junction of the Gros Pin and the Sapin.[44]

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[43] Wisconsin Exhibit 7; July 28, 1841.

"Wednesday—Remained at Astronomical Station between rivers Gros Pin and Sapin, engaged in astro. observations.

This day Lieut. Webster came up with his party. In attempting to run a line from Lac Vieux Desert to the head of Montreal river he fell upon the Easterly branch of the Ontonagon river which he meandered to its mouth. He represents the stream to be exceedingly rapid with numerous falls. The upper part of the stream appears to be over granite, then comes a range of green stone, then a less compact trap and then red sandstone and clay hills. One of the men mentioned seeing what he supposed to be a map of native copper with quartz (larger than he could lift) lying in the bed of the stream."

[44] Wisconsin Exhibit 7, July 29, 1841.

"Thursday—Made a short excursion from Camp and examined a portion of Sapin (Balsam) river. At the point where the great portage crosses this stream granite rises to the surface and forms the bed of the stream. It is chiefly made up of feldspar and quartz, the feldspar having a reddish tinge, occasionally hornblenede is seen in the composition of the traps. This granite is similar to all that I have seen in this district, being rather coarsely crystalline and containing a super abundance of feldspar.

Between the Balsam and Pine rivers red sandstone occurs in angular fragments in such quantities as to lead me to infer

**Cram's Second Report**

The aforesaid journals outline the progress of the party from day to day. The report of Captain Cram on the work of the summer of 1841 shows the general conclusions that were drawn by the party that made this investigation. Cram stated that the junction of "Two inconsiderable streams not more than 20 or 30 feet wide, *called* the Balsam and the Pine Rivers", was the head proper of the Montreal River. This was the result of his investigations in the vicinity and represented his views as well as the views of the representative of the State of Michigan. Cram Said:

> "The latter of these streams (Pine River) was explored to its very head, and found to come from a small lake, and all its feeders are represented on the map (No. 1). This small lake was connected by an offset-line with the main line of the survey; so that if Congress should deem it necessary or expedient to constitute this little lake, which I have called Pine lake, as the head of the Montreal river, its position will be accurately known."[45]

In addition to the rough map made by Douglass Houghton, Cram also prepared an extensive map of the Montreal

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that this rock fills up the space, around the hades of the knobs of granite. The red sandstone in all its essential characters resembles that upon the coast—how often red clay has been noticed.

The erratic Block group is, in this, as over the whole district largely developed in the immense number of bowlders which are distributed over the country.

I sent two of our men to explore the head of the river Gros Pin. They represent the head to be in a lake about 5 miles long and 8 to 10 miles distant from our camp. They also represent the country to be rolling and hilly and timbered with maple, hemlock, spruce, etc. They brought in a specimen of feldspathic granite from a knob near the lake. The distance from the mouth of Montreal river to our camp in a direct line is 18 miles and 963 feet.

[45] Senate Doc. No. 170, supra, p. 3. Plaintiff's Exhibit 23, p. 3.

River and its various tributaries, which in general outline is practically identical with the Houghton sketch.[46]

With respect to the survey of the river, Captain Cram said:

> "This river was surveyed from its mouth up to its highest source, and is represented on map No. 4, from which it will be perceived that the streams feeding this river almost all come from the west. Indeed, there are none entering from the east that can be considered more than small brooks or drains from swamps. None of these are so broad that they can not be stepped across without wetting a foot.
>
> The tributaries from the west generally head in small lakes, and on reaching the Montreal, are deflected toward the north by the dividing ridges separating the Montreal from the head-waters of the other rivers running into Lake Superior—such as the Carp, the Iron, and the Ontonagon.
>
> The head proper of the Montreal is to be regarded, as before stated, at the junction of the Balsom and Pine. At this point, in times of high water, a canoe may be put in and safely run to the mouth, by making several portages."[47]

The party, after completing its investigations in the vicinity of the junction of the Gros Pin and Sapin proceeded easterly and down the Brule and Menomonee rivers.[48] As a result of a further examination of these rivers, Cram stated that:

> "The Brule and Menomonee constitute a very good natural boundary; the precaution, however, should be taken of dividing the numerous islands, so that some may fall within one, and the remainder within the other State. The number of islands in the Menomonee amount to 131: 18 of the principal contain 2,304 acres; some of these are over one mile in length, and from one-eighth to one-

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[46] Wisconsin Exhibit 121.

[47] Senate Doc. No. 170. Plaintiff's Exhibit 23, p. 5.

[48] Houghton Journal, Wisconsin Exhibit 7.

fourth of a mile in breadth, and are covered with an excellent growth of pine.

Innumerable channels occur among the groups of islets; and the best way of disposing of the islands would be, to declare, by legislative enactment, that all the islands down to a certain point (to be specified) shall belong to Michigan, and all below that point to Wisconsin. A case of litigation has already commenced, I am informed, in reference to one of these islands, and the court has been at a loss to decide, from not knowing to whose jurisdiction it belongs."[49]

**Wisconsin's attempt to procure modification of boundary and Congressional efforts in that respect**

Following the report of Captain Cram which was submitted to the United States Senate on March 8, 1842,[50] the Wisconsin territorial assembly on March 19, 1842, passed a resolution reciting the impracticability of the line as required by the act of Congress of June 15, 1836, being the Michigan Statehood Act, and asked for the establishment of a boundary line in accordance with the act of 1805, providing for a line to be drawn due north through the center of Lake Michigan.[51] On December 14, 1842, Senator Porter of Michigan obtained leave to bring in a bill to amend the original Michigan Statehood Act, which bill was thereafter referred to the committee on judiciary.[52] This bill recited that:

"After the said boundary shall have arrived at the mouth of Montreal river, as described in said act, it shall be continued as follows: thence through the main channel of said river to the head thereof, as marked upon the survey made by Captain Cram of the Corps of Topographical Engineers, in eighteen forty one; thence from the

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[49] Sen. Doc. No. 170, supra, pp. 5–6. Plaintiff's Exhibit 23.
[50] Plaintiff's Exhibit 24.
[51] Plaintiff's Exhibit 26.
[52] Plaintiff's Exhibit 27.

said head in a direct line to the southernmost shore of the Lake of the Desert; thence in a direct line to the southernmost shore of Lake Brule; thence along the southern shore of said lake to Brule river, a tributary of the Menominee, and down the channel of said river to the Menominee; thence down the channel of the Menominee to Green Bay; thence to the main ship channel of Green Bay, which passes on the western side of the islands situated therein; thence along said main channel to Green Bay to the middle of Lake Michigan, as further described in said act.

SEC. 2. AND BE IT FURTHER ENACTED, That, to prevent all disputes in reference to the jurisdiction of islands in the said Brule and Menominee rivers, the line be so run as to include within the jurisdiction of Michigan, all the islands in the Brule and Menominee Rivers, (to the extent in which said rivers are adopted, as a boundary,) down to, and inclusive of, the Quinnesec falls to the Menominee, and from thence the line shall be so run, as to include within the jurisdiction of Wisconsin all the islands in the Menominee river, from the falls aforesaid down to the junction of said river with Green Bay."[53]

On January 17, 1843, the committee on judiciary made its report concerning the aforesaid bill. In part the report reads as follows:

"On carefully reading the foregoing description of the boundary it will be seen that the time of passing the act establishing that boundary, it was believed that the Montreal river had its source in the Lake of the Desert, which is now known not to be true; and that of all the headwaters discharging themselves into the Menominee River, one would be found nearer to the Lake of the Desert than any other, and that the nearest head of the Menominee to the lake would be a branch of the Menominee, and not a lake as it is now ascertained to be."[54]

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[53] Plaintiff's Exhibit 28.
[54] Plaintiff's Exhibit 29.

This committee concluded that the bill introduced by Senator Porter removed ambiguities which developed as a result of the investigations made by Captain Cram, and recommended passage of the bill.

On February 28, 1843, which was very shortly before the sine die adjournment of the 27th Congress, the Porter bill was passed by the United States Senate, and was transmitted to the House of Representatives, but apparently in the rush of the close of the session was not reached.[55]

When the 28th Congress met, and on the 13th day of December, 1843, Senator Porter again introduced his bill, which was identical with the previous bill offered in 1842.[56] This bill, having been referred to the judiciary committee, was again by that committee reported favorably with the finding that it covered the same subject as that covered by its previous report.[57] On March 28, 1844, the bill was again passed by the senate.

**The Wisconsin Enabling Act adjusted the boundary in accordance with the wishes of the Michigan delegation in Congress**

No further action seems to have been taken on this bill, and in 1845, the Wisconsin Enabling Act came up for consideration before Congress. When this bill was first introduced, it provided for a boundary line described the same as the boundary line was described in the two Porter bills above referred to. When, however, the bill came up for consideration in the House, Congressman McClelland of Michigan offered two amendments, the first providing for a description of the boundary line from the mouth of the Menominee river to the

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[55] Plaintiff's Exhibit 30.
[56] Plaintiff's Exhibit 31.
[57] Plaintiff's Exhibit 32.

mouth of the Montreal river, as it now appears in the Wisconsin constitution.

> "Strike out all after the words 'Green Bay', in line 13, of section 1, to the word 'thence' in line 19, and insert the following, in lieu thereof: 'To the mouth of the Menominee river; thence up the channel of said river to the Brule river; thence up said last mentioned river to lake Brule; thence along the southern shore of Lake Brule in a direct line to the center of the channel between Middle and South islands, in the Lake of the Desert; thence in a direct line to the head waters of the Montreal river, as marked upon the survey made by Captain Cram; thence down the main channel of the Montreal river, to the middle of Lake Superior.' "[58]

Congressman McClelland also moved a second amendment which provided:

> "And be it further enacted, that, to prevent all disputes in reference to the jurisdiction of islands in the said Brule and Menominee rivers, the line be so run as to include within the jurisdiction of Michigan all the islands in the Brule and Menominee rivers (to the extent in which said rivers are adopted as a boundary) down to and inclusive of the Quinnesec falls of the Menominee; and from thence the line should be so run as to include within the jurisdiction of Wisconsin all the islands in the Menominee river, from the falls aforesaid down to the junction of said rivers with Green Bay; Provided, That the adjustment of boundaries as fixed in this act between Wisconsin and Michigan shall not be binding on Congress unless the same shall be ratified by the state of Michigan on or before the first day of June, one thousand eight hundred and forty eight."[59]

It appears in the Congressional Globe of the first session, twenty-ninth Congress, under date of June 9, 1846, that these

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[58] Plaintiff's Exhibit 34.
[59] Plaintiff's Exhibit 34.

amendments had been agreed upon between the members in Congress of the State of Michigan and the delegate of Wisconsin, and were submitted by Congressman McClelland in accordance with that arrangement.[60]

> "Mr. McClelland moved an amendment, which, he stated, had been agreed upon between the members of the State of Michigan and the Delegate of Wisconsin, to that part of the first section which defines the boundaries of the new State."

**Boundary survey and marking provided for**

The bill, as thus amended was approved on the 6th day of August, 1846, and on the 10th day of August, 1846, an appropriation measure was passed by Congress providing that the President was required to "cause to be surveyed, marked and designated so much of the line between Michigan and Wiskonsin as lies between the source of the Brule river and the source of the Montreal river,"[61] as defined in the Wisconsin Enabling Act, and, accordingly, the commissioner of the general land office directed Lucius Lyon, formerly United States senator of Michigan, and the man who had first pointed out the probable ambiguities in the section of the boundary affected by the proposed survey, to have that part of the boundary from the southern shore of Lake Brule to the center of the channel between the Middle and South islands in the Lake of the Desert, and thence in a direct line to the headwaters of the Montreal River "surveyed, marked and designated."[62] Lyon, accordingly, employed William A. Burt, then one of the best known surveyors, who was familiar with the country in the vicinity of the boundary line,[63] to make the survey required by the act of Congress and directed by the commissioner of the land of-

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[60] Wisconsin Exhibit 306.
[61] Plaintiff's Exhibit 35.
[62] Plaintiff's Exhibit 35.
[63] Wisconsin Exhibit 380 p. 78. Plaintiff's Exhibit 26.

fice.[64] Contracts were accordingly entered into for the completion of this work.[65]

Under date of November 20, 1847, Burt reported that he had completed the survey of that boundary line between Michigan and Wisconsin from the source of the Brule river to the source of the Montreal river, as defined in the Wisconsin Enabling Act.[66] His report continued as follows:

> "In the prosecution of this work, a random line was run, as represented on the Maps, from the centre between the Middle and South Islands in the Lake of the Desert, (Lac vieux Desert) to the Source of the Brule river, which is the outlet of Lac Brule; and another random line from the same point in Lac Vieux Desert, to the head proper of the Montreal River 'as marked on the survey made by Captain Cram.'
>
> The random lines were slightly marked and posts were set thereon at the end of every mile and a half each way from the coast of Lac Vieux Desert, but no other marks were made. The marking was found necessary to enable the packmen to follow the line with supplies of provision, etc. during the progress of the Survey.
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> From data thus obtained, the true boundary line was run, marked and measured, and established in a direct line from Lac Brule, N. 59° 38′ W 13 miles 37 chains, and 66 links (exclusive of the meanders around the South end of Lac Brule) to the centre between the Middle and South Islands in Lac Vieux Desert, and also from the head proper of the Montreal river L. 74° 27′ E. 50 miles, 67 chains and 6 links to the point above described in the last mentioned lake.
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> * * *
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> This boundary line has been well blazed and a post set at the end of each mile and half mile, with two bearing trees to each post faced and notched and noted in the field

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[64] Plaintiff's Exhibit 36.
[65] Wisconsin Exhibit 9.
[66] Wisconsin Exhibit 11.

notes in the Same manner as in the Survey of the public land."[67]

In connection with that same work, Burt also submitted a map showing the extent of the work he had done in this region and which showed just how the boundary line had been laid out. This map was approved by surveyor general Lyon, and became one of the public records showing the boundary line between Michigan and Wisconsin.[68]

**Wisconsin admitted as a State**

Following this report and on May 29, 1848, Congress admitted the state of Wisconsin into the Union,[69] the Statehood Act providing that it was admitted with *"the boundaries prescribed by the act of Congress approved August 6, 1846."* It is to be noted that the reservation previously contained in the enabling act was left out of the Wisconsin Statehood law.

**By the Michigan constitution of 1850, that State ratified and confirmed the boundary of Wisconsin as contained in her enabling act, by adopting the Wisconsin boundary description as Michigan's boundary description.**

In the year 1850 the State of Michigan adopted a new constitution and therein the boundaries of the state were described as follows:

> "To the mouth of the Montreal River; thence through the middle of the main channel of said River Montreal *to the headwaters thereof; thence in a direct line to the center of the channel between Middle and South Islands in Lake of the Desert; thence in a direct line to the southern shore of Lake Brule; thence along said southern shore* and down the River Brule to the main channel of the Menominee River; thence down the center of the main chan-

[67] Wisconsin Exhibit 11.
[68] Wisconsin Exhibit 184 Opposite.
[69] 9 U. S. Stats. at L., 233.

nel of the same to the center of the most usual ship channel of Green Bay of Lake Michigan; thence through the center of the most usual ship channel of the said Bay to the middle of Lake Michigan." (Parts in italics identical with description in Wisconsin boundary)

It is to be noted that the words of the Wisconsin boundary line "As marked upon the survey of Captain Cram" were not included in the Michigan boundary description, and probably for the very evident reason that between the time of the marking by Cram as well as the definition in the Wisconsin Enabling Act, and the adoption of the Michigan constitution, the boundary line, as so marked by Cram, was definitely laid out and marked upon the ground by Burt—hence reference to the Cram survey was unnecessary.[70] Following 1848, and down to the present time, Wisconsin has asserted that the correct boundary line was laid out by Burt and continued down the Menominee River so as to divide the islands between Michigan and Wisconsin in accordance with its enabling act, and so on July 22, 1854, the surveyor general for Wisconsin, located at Dubuque, Iowa, directed Richard Hall, United States deputy surveyor, to "survey all valuable islands in the Menominee River from its mouth as far as the *Quinnesec Falls, which is as far as the State of Wisconsin or this office has jurisdiction.*"[71] (Italics ours) Accordingly, Hall, as such surveyor, surveyed numerous islands, apparently all the islands considered valuable at that time as being in Wisconsin. Likewise, from time to time, thereafter, various surveyors surveyed different islands below Quinnesec falls as being in Wisconsin, with the result that up to the present time there have been about forty-six different parcels surveyed below Quinnesec falls representing islands or parts of islands, a

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[70] See Brief pp. 99–108, for fuller discussion of this proposition.
[71] Wisconsin Exhibit 365 p. 5.

large number of which are now claimed by Michigan to be in the State of Michigan.[72]

### Michigan's Constitutional Convention of 1867

In 1867 the next constitutional convention of Michigan was called, and that convention readopted the boundary description of the constitution of 1850, but added thereto the words, with reference to the headwaters of the Montreal River, contained in the Wisconsin Enabling Act, "as marked upon the survey made by Captain Cram by authority of the United States."[73] Considerable discussion took place in the convention as to the reason for this change. Mr. Lamb, a member of the committee on boundaries of the convention, stated that "at the time the boundary line of the northwest border of our state was fixed, it was supposed that the Montreal River reached the Lake of the Desert. The survey has shown that that river does not come within many miles of that lake." Mr. Longyear, another member of the committee, stated that the language added was simply put in for the purpose of advising everybody just where the headwaters were considered to be.[74] Mr. Burtch, another member of the convention, assuming the roll of prophet, stated that:

> "One reason for it (adding the additional language) is that it may relieve high-minded legal gentlemen of the ne-

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[72] Wisconsin Exhibit 365, Wisconsin Exhibit 153 and Wisconsin Exhibit 154.

[73] Wisconsin Exhibit 33, p. 2.

[74] Wisconsin Exhibit 33, p. 2.

"MR. LONGYEAR: Mr. Chairman, this clause was inserted by the committee for the purpose as has already been stated, of rendering this particular portion of the boundary more definite and precise. In the present Constitution, this portion of the boundary is described simply as the head waters of the Montreal river. Now, it is well known that, in this county at least, the phrase head waters of a river is a very definite and uncertain description in fixing a boundary.

cessity of appearing before the Supreme Court of the United States, to argue the question of the boundaries of

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I recollect that on one occasion, when traveling in the woods of this country during a very dry season, I determined, judging from the map, that I should fix my quarters for the night near some water, yet at the point where on the map water was indicated, I found the place as dry as the floor of this house.

Such phraseology as that used in the present Constitution is very uncertain. The committee therefore set about finding some more precise description from the acts of Congress of this State, or other authorative sources. In the enabling act of Congress, under which the State of Wisconsin was organized as a State, we found a more certain description of the boundary. In that act, which will be found in the Statutes at Large, col. 9, page 56, giving a description of boundary corresponding with the description in this article, being the same line precisely, this language is used:

'Thence in a direct line to the head waters of the Montreal river, as marked upon the survey made by Captain Cramm.'

This fixes a definite point; for this survey is of course among the records of the United States Government. The committee, therefore, in defining the boundary of our State, used the same language that is employed to define the same line in the act fixing the boundary of the State of Wisconsin. The committee regarded it as important (and as one member of the committee I see no cause to change my view upon the subject) that this point should be definitely fixed. We think the article, as we have reported it, does fix the boundary as definitely as may be.

* * *

The original Constitution of 1835 was adopted and submitted to Congress without any enabling act. The state was admitted upon certain conditions relating to its boundaries, which were set forth in the act of admission, and the boundaries of the State as defined in the Constitution of 1850 were taken from that act of Congress.

Those boundaries were defective in one particular; in the very respect in which the committee recommended a change to be made in the provision of the Constitution of 1850 relating to that subject; the north-west boundary between Michigan and Wisconsin. That boundary as set forth in the Constitution of 1850, commences on Lake Superior at the

this State, and thus many long, important and able arguments may be squelched and never heard of, which otherwise might be presented in case a difficulty in regard to our boundaries should arise."[75]

As a result of this very extended discussion, the additional words above referred to were adopted by the convention in committee of the whole, and on May 24, 1867, were adopted by the convention after Mr. Lamb, a member of the convention, advised the convention that the changes proposed "were very immaterial."[76]

This constitution, however, was rejected by the people of Michigan because it contained liberal provisions for suffrage, and because it raised salaries of public officers materially.[77]

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mouth of Montreal river and runs thence up the river to the Lake of the Desert, etc. That was no doubt upon the mistaken idea that the Montreal river rises in the lake of the desert. The fact is, however, that the river does not rise in that lake, nor are any of its head-waters within from seventy to a hundred miles of that lake. Hence there was an error of some seventy or one hundred miles in the boundary as set forth in the Constitution of 1850. That error has been remedied in an act of Congress passed subsequently to the act for the admission of this State, to which I have already referred: The enabling act under which the State of Wisconsin was organized.

Now from the very fact that the boundaries of this state are fixed and determined by so many different acts of Congress, it seems to be highly proper that in the organic law we are now about to frame, we should place a recognition of the boundaries as thus determined. It is important also as a matter of convenience, to avoid the necessity of looking through all these statutes. The committee had considerable trouble to find out, from an examination of the statutes, the correct boundaries of this State in every particular. For these reasons, I consider it important that this description of the boundaries of this State shall be inserted in our new Constitution."

[75] Wisconsin Exhibit 33, p. 7.

[76] Wisconsin Exhibit 33, p. 10.

[77] Wisconsin Exhibit 34.

### The Michigan Constitutional Commission of 1873

Following the rejection of the constitution of 1867, a special constitutional commission was appointed in 1873, which reported a proposed new constitution.[78] This constitution again contained the language "as marked upon the survey made by Captain Cram." In its report of its proceedings, it referred to this amendment, stating that the additions made no change in the boundary, and that they were merely intended to make the description more specific. Reference was made to the Wisconsin Enabling Act and to the speeches of Mr. Longyear in the convention debates of 1867. In transmitting its report to the governor, the commission explained that the explanatory notes following the constitution were prepared under its direction.[79] This constitution also was rejected by the State of Michigan.

### The Michigan Constitution of 1907

From that time on there was no official action taken with reference to the boundary of Michigan until 1907, when the constitutional convention of that year adopted a new boundary line definition entirely different from any that had previously been adopted and from any authorized by the Congress of the United States. This definition, so far as is material, read as follows:

> "Thence in a direct line through Lake Superior to the mouth of the Montreal River; thence through the middle of the main channel of the west branch of the Montreal River to Island Lake, the headwaters thereof; thence in a direct line to the center of the channel between Middle and South islands in the Lake of the Desert; thence in a direct line to the south shore of Lake Brule;"

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[78] Wisconsin Exhibit 32.
[79] Wisconsin Exhibit 32.

It will be observed that the "west branch of the Montreal river" is mentioned in the constitution in place of the "main channel of the Montreal river" as provided in the Michigan statehood act. Also that "Island Lake" is designated as the headwaters thereof, and that the boundary was then projected from this lake in a direct line to the "center of the channel between the Middle and South islands of the Lake of the Desert;" also that in the apparent haste of the framers of this provision, they neglected to include that part of the Montreal River extending from its mouth to the junction of the west branch of the Montreal River with the river as generally described as the Montreal River. This constitution was submitted to the people under the act providing for the calling of the convention,[80] which act provided that the convention should "before its adjournment prepare and adopt an address to the people of the state, explaining the proposed changes in the present constitution, and the reasons for each change, and such other matters as the commission should deem advisable."[81]

Although section 10 of the act, calling the convention, provided for an explanation as to all changes, and a statement of the reasons for any amendments, no explanation was given for the change in the boundary line description, and the constitution was submitted to the voters without explaining or even indicating to them the real effect of the change in this language or that any change had been made at all.[82]

Moreover, when the question was discussed before the constitutional convention as to the reason for the incorporation of the change in the designation of the boundary in the vicinity of the Montreal River, Mr. Burton, a member of the convention, stated that:

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[80] Wisconsin Exhibit 39.

[81] Wisconsin Exhibit 39, sec. 10.

[82] Wisconsin Exhibit 39, p. 2.

"Our first idea was to leave the boundary line out entirely, but, as you are aware, there is some question about the location of the boundary on the northwest, and very likely some action will be taken, either by Congress or in some of the courts, in order to find where our western boundary is. The matter was submitted to the Attorney General and after some discussion with him, he drew up this plan, including within our line the best of land which is in dispute. It is properly inserted and for the purpose of having such influence as it might have upon any settlement that we might enter into with the State of Wisconsin."

It is to be noted that these words were not inserted by way of making any claim to the territory now claimed, but only for the purpose of having some effect in negotiating a settlement with Wisconsin. Moreover, the only section of the boundary considered to be indefinite or uncertain was that in the vicinity of the Montreal River, and the convention seemed to have no question as to the completeness and finality of the rights of both parties in Green Bay and in the Menominee River.

**The boundary investigation conducted by Michigan in 1907**

As a result of action taken by the legislature of Michigan in 1907, the Attorney General of Michigan was directed to investigate the boundary and to institute necessary proceedings to secure a determination of the correct boundary. Accordingly, he instituted an extensive investigation and employed one J. B. Davis, a professor of engineering in the University of Michigan to make an investigation. After the investigation which extended over a period of practically two years, Prof. Davis reported among other things that:

"The Montreal river has a rocky, stable channel, not likely to shift. The works of man have made no change in its course at its mouth. The cast Branch, now so

called, is the larger and the 'main channel' of the Montreal. Notwithstanding some 750,000 gallons of water was taken daily from the East Branch to supply the cities of Ironwood, Michi, and Hurley, Wis. I *estimated* that the discharge of the East Branch at its junction with the West Branch was more than twice the discharge of the West Branch. *Neither branch nor the river below, could be gauged.* The East Branch has a wider, deeper and more river-like channel. It also has flood channels, more or less marked, where the waters in flood time, apparently, cross the land in a bend this branch makes as it turns to join with the West Branch. The flood plane of the East Branch is much the larger, higher and more characteristic, with gravel deposits some three feet above the stage of water at the time of examination, and of considerable extent. The flood plane of the West Branch is a comparatively small feature. The flood wood lodged in the East Branch at the junction is three times that in the West Branch. I saw little or no flood wood below the junction. Whole trees are in the jam in the East Branch, including a hemlock two feet in diameter at the butt. These features mark the East Branch as a stream of much greater power than the West Branch. There is an opening in the forest at the junction of these branches of a character quite familiar to woodsmen that would hardly be missed by an experienced explorer following up the Montreal river as Captain Cram's men did. Once at the junction of the branches it is easy to see which branch is the main stream. Captain Cram's map No. 4 (herewith) shows a reasonably correct sketch of this junction, indicating that his men visited it. Captain Cram says in his second report, see p. 50 of this report, that he surveyed the Montreal river. Both branches of the Montreal river have boulder paved channels, which apparently, have not shifted. These boulders, which are in great variety up to two or three feet thick, prevent any gaugings being made. The stage of water was so low when I visited these streams that the boulders were not always covered. Below the junction of the

branches I found the boulders in the channel running larger. The Montreal river is a good stream for a boundary because its channel is so stable and so well marked by the pavement of boulders.

At Ironwood and Hurley the East Branch has been dammed forming a pond. As time passes and further developments are made, it is possible that other works will be built obliterating, covering or changing the channel.

Proceeding up the East Branch above Ironwood and Hurley the channel runs in alluvial deposits, the boulder paved channel becoming broken, or interrupted, by reaches where the bottom and sides of the channel appear to be soil. There are appearances indicating the channel may have shifted, but these indications may be really flood channels, as I did not walk over this ground. Within a few miles the boulders appear in the channel again.

At the junction of the Pine and Balsam rivers is a sort of amphitheater, some 500 or 600 feet broad, between the hills, and a very suitable place for a prominent landmark or monument. At this place the channels of the streams are in alluvial deposits, but these channels do not appear to have shifted,—see sketch of them at their junction on general map. This junction is on the west half of the northwest quarter of section thirty-three T. 45 N., R. 3 E. Wisconsin.

Pine river is the outlet of Pine lake. This outlet is on the east half of the northwest quarter of section twenty-nine T. 44, N., R. 3 E. Wisconsin and is some five miles south and a mile and a quarter west of the junction of the Pine and Balsam rivers. Pine lake is a beautiful lake of irregular outline, with wooded shores for the most part, and wooded islands. Shores often swampy but not always. This lake is about a mile and three-quarters long and north and south from a third to three-fourths of a mile in width. The outlet is about a mile and a third from the south end of the lake and flows from a bay in the northwest part of it. Outlet is some fifty feet wide, but the water is held back by a dam. A rod is a fair breadth for the channel of

Pine river after it leaves the lake and takes its characteristic form.

The Balsam river is a small stream rising in the swamps some six or seven miles southwesterly from its junction with the Pine. Wherever I saw it I found it following a channel in alluvial deposits, but saw no sign of its shifting. This channel is some twenty feet wide for a quarter of a mile or so above the junction. It was discharging water that might from a shallow creek three feet wide. There were long pools of water. There were some sand deposits some three or four feet above water level; but these may have been caused by letting the water out from a pond at an old lumber camp some eighty rods above the junction, for floating out logs, and not by floods, as there were no such evidences of floods found above the lumber camps. Open marsh land at and just above the junction with few trees, now dead, or cut.

So far as size is concerned the Pine river is very similar to the Balsam,—a twin in fact—except that it was carrying a little more water, and flows through a well defined valley for a half mile or so above the junction, which is not the case with the Balsam.

The Junction of the Balsam and Pine rivers is on cut-over lands. The timber is cut or dead."[83]

Following this report, the Attorney General of Michigan on May 5, 1909, wrote to the chairman of the senate committee on state affairs that:

"* * * I engaged the services of Prof. J. B. Davis of the University of Michigan, and we have made such investigation as enable us to place before the legislature a complete history of the legislation, and directions of the war department leading up to the location of the present line, together with a large number of other facts obtained from a personal investigation and inspection of the line.

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[83] Davis Report, Wisconsin Exhibit 380 pps. 88–91.

It is not quite clear from such resolution whether it is the desire of the legislature that I should add to this history my conclusions, legal and otherwise, upon the facts found. If such be the desire of the Legislature, I suggest that you so indicate by a resolution. For the purpose of making the situation more easily understood by the public, copies of certain maps which we found in the War Department at Washington should be added to these conclusions. Will you also indicate whether it is the desire of the Legislature that the same should be printed when it is completed?"[84]

Apparently, as a result of this report, the Chairman of the Committee on State Affairs offered a resolution that:

"Whereas, the Attorney General has informed the Legislature that he has now completed his investigation of the boundary line between Michigan and Wisconsin, and that he has compiled a complete history of the acts of Congress and directions of the War Department leading up to the location of the line where it now is; but that he is in doubt as to whether it is the desire of the Legislature that he should add his conclusions of law and fact upon such record; therefore

Resolved by the Senate (the House of Representatives concurring), That the Attorney General be and is hereby directed to add his conclusions of law and fact upon the record so compiled by him; to procure copies of such maps and add to his report as he deems advisable to make the situation more easily understood. and to cause the same to be printed and submitted to the next session of the Legislature."[85]

Apparently this resolution was never complied with so far as the publication of such record is concerned, but the record by stipulation of parties shows that the conclusions

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[84] Extracts from Journal of the Senate file State of Michigan. May 11, 1909. Wisconsin Exhibit 380.

[85] Extracts from Journal of the Senate of the State of Michigan. May 11, 1909. Wisconsin Exhibit 380.

of Davis were the conclusions of the Attorney General who was ready to report to the legislature. From that time on, nothing further was heard of any boundary line controversy until 1919, when a new investigation was undertaken.

**Michigan's boundary investigation of 1919 and 1921**

The legislature by the passage of the act of June 25, 1919, directed the appointment of a commission "to investigate the *disputed* boundary line between the states of Wisconsin and Michigan,"[86] this act was amended by the act of the Michigan legislature of May 18, 1921, directing the same investigation of "the *disputed* boundary line."[87] At that time the only disputed boundary line that had ever developed as between these states was the boundary line in the Montreal River section, and there never was, so far as the public acts or records of Michigan show, or any evidence offered in this record demonstrates, any direction by the legislature or any governmental body of the State of Michigan to claim any of the islands in the Menominee River that are now being claimed by the plaintiff's attorneys, nor was there any direction to claim any of the islands in Green Bay. The claim here made to the islands is not the claim of the State of Michigan, but of its Attorney General and Special Counsel. Michigan as a state still is content with the bargain she struck with Wisconsin in 1846 through her representatives in Congress. Her representatives, probably due to an over-zealous conception of their duties or a lack of understanding of what the State considered was "disputed territory" or of appreciation of the importance of keeping their agreements inviolate, have raised an issue which the state has never recognized.

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[87] Plaintiff's Exhibit 169.

## THE THREE DIVISIONS OF THE BOUNDARY INVOLVED IN THIS SUIT

From what has been said, it is apparent that the claims of Michigan may be divided into three sections; first, the Montreal River section, comprising the area extending from the junction of the Montreal River with the West Branch of the Montreal River, and extending easterly from the West Branch of the Montreal River to the Lake of the Desert and Lake Brule; second, the islands in the Menominee River; and, third, the islands in Green Bay.

## ANALYSIS OF MICHIGAN'S CLAIMS

(a) Michigan's claims are founded upon three principal propositions:

1. That the boundary line defined in the Michigan Enabling Act is definite, fixed, certain and unalterable.

2. That the present boundary, as surveyed, and as recognized by all parties since 1848 is not in accordance with the boundary described in the Michigan Statehood Act, and that the territory embraced within said present boundary does not contain all the territory intended to be given to Michigan by her enabling act.

3. That Michigan was not aware of the actual facts until 1907.

(b) The complaint is also founded upon certain secondary propositions.

1. As to the Montreal River area—

a. That by the Montreal River Congress meant the West Branch of the Montreal.

b. That Island Lake is the proper point for the land boundary to begin, and that instead of leading through the lake commonly known as Lac Vieux Desert, the boundary line should run directly to Lake Brule on the theory that Island Lake is

the Lake of the Desert referred to in the Michigan Statehood Act.

2. As to the Menominee River section.

a. No claim is made except lack of knowledge as to the exact rights of Michigan by the public officials of that state.

3. As to the Green Bay area.

a. Lack of knowledge as to the exact situation with reference to the course of shipping into and through Green Bay in 1836 and since that time.

b. That the most usual ship channel cannot mean the best ship channel.

## THE EXACT LINE MARKING WISCONSIN'S SOVEREIGNTY AS EXERCISED SINCE 1836 IS NOT IN DISPUTE IN THIS CASE.

Before approaching a discussion of the evidence, it is well to call the Court's attention to the exact issue presented by plaintiff's complaint so far as this boundary is concerned.

Michigan's complaint recognizes the fact that Wisconsin has exercised uninterrupted, undisturbed and undisputed sovereignty over the entire territory claimed by Michigan in this proceeding throughout the period from 1836 to 1907, and undisturbed and uninterrupted sovereignty since that time. This fact is also conceded by Michigan in its brief on the motion made by the State of Wisconsin to dismiss these proceedings.[88]

Likewise, the stipulation, entered as part of the record in this case, admits that Wisconsin has taxed the lands in the disputed area since the time that the lands were patented to private individuals, and that such taxation has continued uninterruptedly since that time.[89] The evidence also discloses that taxation of the islands in Green Bay commenced as early

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[88] Plaintiff's Brief in opposition to defendant's motion to dismiss this action, p. 134.

[89] R. p. 1010.

as 1841, and continued from that time. Wisconsin established its county lines with respect to the boundary line as laid out, measured and surveyed ever since it became a state, and the Michigan county lines have not been extended beyond the particular boundary line now laid out and as now claimed by Wisconsin.[50] The boundary heretofore marked as showing the limits of these two sovereignties is clearly undisputed, and no issue is raised about it in plaintiff's complaint,[51] nor is any question raised that any doubt exists or will arise as to the boundary claimed by Wisconsin should Wisconsin be right in this claim.

## ARGUMENT

**When Michigan adopted the language of the Wisconsin boundary as set forth in her Enabling Act, and incorporated it in her constitution of 1850, she thereby assented to the terms and conditions of the Act creating that boundary, accepted it within the intent and meaning of that Act, and is now bound thereby.**

As has been previously stated in this brief, Lucius Lyon who was instrumental in procuring the boundary line contained in the Michigan Statehood Act, Douglass Houghton, chief geologist of Michigan and special commissioner appointed by Michigan to investigate the boundary and to represent Michigan in the survey of that boundary made by Captain Cram in 1841, and Captain Cram as the official surveyor of the United States government, all concluded that the boundary line definition contained in the Michigan Statehood Act of 1850 could not be carried out in its exact terms, and that some adjustment thereof would have to be made. Thereafter,

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[50] Wisconsin Exhibits 199 and 200.
[51] Wisconsin Exhibit 184, Figure 52.

the Michigan representatives in Congress procured the passage by the House of Representatives in 1842 and 1843 of two bills, which proposed to provide a boundary definition which should follow substantially the boundary intended by the Michigan Statehood Act. These definitions were substantially the same as the definition of the Wisconsin boundary line finally defined in the Wisconsin Enabling Act of 1846. The Michigan representatives were largely responsible for the particular boundary line definition contained in the act of 1846, enabling the Wisconsin territory to form a state government. In order that Michigan might give due consideration to the adjustment of the boundary, the Michigan representatives added to the Wisconsin Enabling Act, the following provision:

> "Provided, that the adjustment of boundaries as fixed in this act between Wisconsin and Michigan shall not be binding on Congress unless the same shall be ratified by the state of Michigan on or before the first day of June, One Thousand Eight Hundred and Forty Eight."

What were these adjustments of boundaries proposed by the Wisconsin Enabling Act? First, instead of following up the main channel of the Montreal River to the middle of the Lake of the Desert, the line was to follow the main channel of the Montreal River to the headwaters thereof, as marked upon the survey of Captain Cram, thence in a direct line to the center of the channel between Middle and South Islands in the Lake of the Desert. Second, instead of running from the middle of the Lake of the Desert in a direct line to the nearest headwaters of the Menominee River, and thence through the middle of that fork of said river first touched by said line to the main channel of the Menominee River, as provided for in the Michigan Statehood Act, the boundary was to proceed from the center of the channel between the Middle and South Islands of the aforesaid Lake of the Desert in a direct line to the southern shore of Lake Brule, which was not the nearest headwater

of the Menominee River and thence down the main channel of the Brule River to the Menominee River. Third, in view of Captain Cram's recommendations for a division of the islands in the Menominee River, it was provided by the Wisconsin Enabling Act that all islands below Quinnesec Falls should go to Wisconsin, and all islands above Quinnesec Falls should go to Michigan, while in the Michigan Statehood Act, the division was to be determined by the main channel of the Menominee. These three adjustments were to be accepted by Michigan by June 1, 1848. Before such acceptance could be made and before the expiration of that period, the United States government caused such boundary line, so far as it was a land boundary, to be surveyed, marked and staked out, and even before the expiration of the period specified, the State of Wisconsin was admitted into the Union "with the boundary described by the act of Congress approved August 6, 1846." True it is, Michigan did not accept the boundary given to Wisconsin, nor did she accept the adjustment proposed by the Wisconsin Enabling Act within that period. Two years thereafter, however, in 1850, pursuant to a provision of her constitution adopted in 1835, a new constitutional convention of that State was called, and that convention incorporated a boundary line definition into the new constitution which was adopted by a representative vote. That boundary line definition was different from the definition of 1836 in all of the respects above specified except the third. Michigan by that constitution adopted the identical words of the Wisconsin Enabling Act, with the exception of the words "as marked upon the survey of Captain Cram." These last named words had become entirely unnecessary, and were used only in the Wisconsin Act until line could be laid out on the ground and, accordingly, Congress directed the survey of this boundary line along the places where Captain Cram had marked and surveyed it, and directed that this line be designated upon the ground within four days after the passage of the Wisconsin

Enabling Act. This survey was made by William Burt in 1847 and accepted by Congress. Thereafter, the latter survey, marking and designation became the line and superseded the survey of Captain Cram. For this reason the omission of the words above referred to was a mere omission of something which, after the Burt survey, added nothing to the boundary as it existed and as it was adopted by Michigan. After the survey made by William Burt, anyone looking for the boundary would not turn to the notes of Captain Cram, but would go upon the ground, take William Burt's report of his survey and trace out his markings and designations upon the ground, as described in his report of survey.

Congress by providing for the acceptance of the boundary provisions of the Wisconsin Enabling Act did not specify the method or formality of the assent to be given. It merely said that Michigan should ratify "the adjustment of boundaries as fixed in this (Wisconsin Enabling) act." For that reason the adoption by Michigan of her constitution of 1850 with the foregoing description substituted for the boundary description specified in her statehood act of 1836, the same as the Wisconsin Enabling Act, must be held to constitute an acceptance of the Wisconsin boundary line, and of the adjustment of the Michigan boundary line in accordance with the intent of the Wisconsin Enabling Act. Now, although Michigan did not say she ratified the boundary adjustment provided for by the Wisconsin Enabling Act, she did say the equivalent by incorporating the line description in the Wisconsin Enabling Act as her line, and recognizing it ever since. Congress had never, up to the adoption of the Michigan constitution in 1850, withdrawn the privilege accorded to Michigan to accept that boundary line. Michigan acted upon the proposition submitted by Congress as soon as her regular machinery could function, and by it Michigan accepted the Wisconsin boundary line, according to our theory.

True it is that Michigan said nothing about the islands in

the Menominee River, and specified in her boundary that the main channel of the Menominee River should be the boundary line. Our proposition, however, is that the adjustment of this boundary line difficulty was submitted as one proposition. Congress by this proposition offered the adjustment of the entire boundary, and it gave Michigan the right to accept or reject the entire adjustment. For this reason Michigan cannot now be heard to deny the acceptance of the entire proposition for she has specifically accepted the greater portion of the adjustment, and expressed no dissent as to the remainder.

The justice of this claim, we submit, becomes more apparent and evident when, as is established by the uncontradicted evidence of this record, it was found that the Brule River and its source, Lake Brule, were not the headwaters of the Menominee River nearest to the Lake of the Desert, but that the Paint River was. The record establishes that the Brule River rises nine or ten miles away from Lac Vieux Desert, while the Paint River rises within two miles of Lac Vieux Desert.[92]

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[92] R. P. 612–613, 648–649, Hotchkiss; 812–815, Halbort; 933–940, Houghteling.

Testimony of witness Hotchkiss:

"Q I believe you also stated Mr. Hotchkiss, that you were familiar with the confluence of the Paint and the Brule?"

A Yes.

Q And which of the rivers forming that confluence is the larger stream?

A The larger stream at this junction is the Paint.

Q You have spent considerable time in that country, have you not?

A I spent two years doing geological work in that region in Florence County there and mapped the geology of this junction in detail.

Q Are you familiar with the course of the Paint River?

A Of the geology of the maps I am; not fully the course of the Paint in detail."

Testimony of the witness Halbort.

"Mr. Rieser: Now Mr. Halbert, have you made a further study with reference to the source of the Paint river?

**Again, the justice and equity of our proposition is emphasized when, on looking at the map, it is discovered that had Michi-**

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A Yes.

Q When was that study made?

A That was made last Sunday. It was made in company with Mr. Houghtelling.

Q And what were they?

A I went from a point near Lake Vieux Desert to the headwaters of the Paint. I went down that River or Creek to Elmwood, Michigan.

Q Elmwood is where Michigan Highway 12 crosses the river?

A Yes sir.

Q Referring Mr. Halbert, to the headwaters of the Pine river, which is a tributary of the Menominee river, does that rise anywhere near Vieux Desert?

A It does not rise very close to Vieux Desert.

Q Are you familiar enough with the situation up in that region to say about how far the headwaters of the Menominee river, either the Brule or the Pine as distinct from the Paint River, are from Vieux Desert?

A I think the closest point that the Pine river gets to Lake Vieux Desert is in the neighborhood of Lake Kentuck shown on this map and located perhaps ten miles from Lake Vieux Desert.

Q And southeasterly is that right?

A Yes. There may possibly be a river flowing into the Brule located just to the east on this map.

Q That would be to the east of what range?

A To the east of the range between 12 and 13 east, of Wisconsin which would probably be fully ten miles from Lake Vieux Desert.

Q And that would be the closest?

A Yes, so far as I know, either that or Lake Kentuck would be the closest.

Q How close did the headwaters of the Paint that you followed down, come to Lake Vieux Desert?

A Less than two miles in a direct line.

Q And from the source of the Paint, as you describe it, as rising less than two miles from Lake Vieux Desert, will you just describe the river, the nature of it, the size of it, etc.?

A The river rises in the southeast quarter of section 28, and in the southwest quarter of section 27, and the North-

gan accepted and stood by her original boundary definition, the Paint River would have become the boundary, and a very val-

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west quarter of Section 34. The river is a live stream five feet wide up to twenty feet wide.

MR. SAWYER: At its head?

A It is five feet to fifteen feet where it leaves a large bunch of springs right at the headwaters, and going down stream it is twenty feet and in some places forty feet wide or more. I am of the opinion that these very wide spreads of forty feet are created by beaver dams or some obstructions in the stream. Where the stream is five or ten feet, there is a perceptible flow. The stream passes through a wooded territory covered with hardwood and bears in a northeasterly direction and was followed a distance of seven or eight miles to Elmwood.

MR. SAWYER: Are you speaking now of the Paint or Cook's Run?

A I am speaking of the Paint.

MR. SAWYER: Do you claim that the Paint rises within two miles of Lake Vieux Desert?

A I claim it rises in those sections and I want to look at those.

Answer continuing: This stream is known as the Paint and it rises—the springs in which it rises which are closest to Lake Vieux Desert, are located in the Northwest quarter of Section 34. There is a defined stream there when you reach not to exceed two or two and a quarter miles in a direct line from Lake Vieux Desert to the north and a little east.

MR. RIESER: I might say that part of your testimony is based upon the map showing the reservoirs of the Wisconsin Valley Improvement Company, the drainage area of which extends beyond or north of the line between Wisconsin and Michigan as now laid out?

A Yes, the lakes here are controlled by the Wisconsin Valley Improvement Company and they are used in order to regulate the flow of the water by that company.

Q Down the Wisconsin River?

A Yes."

Testimony of witness Houghteling, pages 933-940, is to the same effect as the above evidence, at page 940: "It is called the 'Paint' by the residents around there and on the maps and everything—everything goes to indicate that it is the Paint."

See also Wisconsin Exhibit 199.

uable and extensive territory now enjoyed by Michigan would have reverted to the State of Wisconsin. But if Michigan is now permitted to assert that she never accepted the islands in the Menominee River or the division of these islands, in accordance with the Wisconsin Enabling Act, then Michigan will have accepted that portion of the boundary adjustment which turned out to be profitable to her and will be permitted to reject that portion of the adjustment which has turned out to be unprofitable, and not as good a bargain as Michigan thought it was.

The situation confronting Congress at the time of the passage of the Wisconsin Enabling Act in substance presented a doubt as to the rights of either state, so far as Michigan was concerned as to just what her boundary should be; as far as Wisconsin was concerned just how her boundary should be run. Michigan requested an adjustment. Congress, at the suggestion of Michigan's representatives in Congress, submitted a proposition for the adjustment of this boundary, which Wisconsin, then in effect under national guardianship as a condition of having this national guardianship ended, was required to accept. Michigan was given the right to accept or reject. Wisconsin accepted the offer of Congress, but Michigan failed to accept within the period allotted her. Within that period, however, and in recognition of Wisconsin's acceptance of the congressional proposal, Congress made the boundary final, first, by marking part of it upon the ground, second, by admitting Wisconsin as an independent state with the boundaries in her enabling act and without any reservation contingent upon Michigan's acceptance of these boundaries. By that act, clearly, the period for acceptance was made a continuing offer, extending beyond the two year period in which Michigan might accept or reject. Two years later and in 1850, Michigan accepted the boundary. From that time on for nearly seventy-five years all parties continued to recognize

the boundary as binding and final. Such a situation between individuals would be conclusive within familiar rules.

*Cood v. Cood*, 33 Beav. 14.

*Bonner v. Beard*, 43 La. Ann. 1036, 10 So. 373.

Is it between States? Why not? As was said in *United States v. Knabe et al.*, 147 Fed. 802, 806:

> "The law favors compromises and settlement of disputed property and pecuniary rights, as well where the government is a party as where the litigation is solely between private individuals. When propositions of compromise of such disputes are made to the government and accepted by it, the courts will apply the same rules for ascertaining their meaning as govern in construing like contracts between man and man. An act conveying, as part of the terms of compromise and settlement, upon a valuable consideration, property the United States acquired in litigation with parties, falls neither within the letter nor the reason of the rule which requires grants of franchises or special privileges to be construed most strongly in favor of the grantor and most strictly against the grantee. The court is of opinion that the compromise and settlement made with the Secretary of the Treasury, which Congress ratified and directed to be carried into effect, satisfied, discharged, and released all claims of the United States 'to enforce the title of the United States to the real estate so purchased, or to secure the possession thereof, or an accounting for the rentals thereof,' and ended the 'litigation resulting therefrom,' and therefore operated a full discharge and release to these defendants from all liability upon the bond in suit."
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> *12 Corpus Juris*, 336, Note 1.

The doctrine of *Virginia v. Tennessee*, 148 U. S. 526, likewise is not different in principle from this case. If anything, the facts in this case are stronger because we have the formal consent of the voters who adopted the constitution of 1850, which adopted the Wisconsin boundary, a step that was miss-

ing in the Virginia–Tennessee case. This Court said in the above case:

> "The compact of the two States, establishing the line adopted by their commissioners, and to which Congress impliedly assented after its execution, is binding upon both States and their citizens. Neither can be heard at this date to say that it was entered into upon any misapprehension of facts. No treaty, as said by this court, has been held void on the ground of misapprehension of facts, by either or both of the parties. *Rhode Island v. Massachusetts*, 4 How. 591, 635."

While no compact was entered into between the states, the boundary line described was proposed by Congress, after its agent Captain Cram and Michigan's agent Douglass Houghton had agreed upon the general course of the boundary. That would have been all that commissioners appointed by the two states could have accomplished. Before any binding effect could have attached to any agreement entered into by any commission, one further step would have been necessary, that is, agreement by the respective states, so that when Congress proposed the matter of adjustment, it stopped at the point where commissioners would have stopped. The last step was then up to the states. Would they accept or reject the congressional proposal. Wisconsin accepted it expressly. Michigan accepted it by incorporating it into her constitution. Thereby the situation is no different than that in the case of *Virginia v. Tennessee*, supra, and the principles of that case must cover this case.

Before entering upon the discussion of the various claims of the State of Michigan, as above set forth, it is necessary to present the evidence in the record in this case so that a full understanding of the actual situation, as it existed in 1836, may be obtained.

## THE MONTREAL RIVER SECTION

**The Montreal River, identified in Captain Cram's map,[93] was well known for many years prior to 1836.**

As stated above, Michigan cannot prevail in her claim so far as the Montreal River section is concerned, if it appears from the record in this case that in 1836 the Montreal River, identified by Captain Cram as such, was actually known as the Montreal River and the West Branch was known as the West Branch of the Montreal River or by some other name to distinguish it from the Montreal River, because then Captain Cram adopted the exact language of his instructions, and followed the definition of the boundary line contained in the Michigan Statehood Act.

The Montreal River is one of the oldest rivers on the Lake Superior shores, and its name, according to tradition, was given to it by the missionary and explorer, Duluth, or some Jesuits who preceded him.[94] It appears on Franquelin's map of 1688,[95] and from that time on almost every map published has some reference to the Montreal River. In the works of Masson, volume 2, page 167, it is stated that the Montreal River rises in Flambeau Lake eighty leagues to the southwest of its mouth, and it is described as being a continuous rapids from within ten leagues of its source.[96] One reason why the Montreal River, though very small, has been such an important element in the history of that section of the country is that along its valley the traders, employed by the Northwest Fur Company and its successors, proceeded from Lake Superior and one of their principal lake posts at La Pointe near the present city of Ashland, Wisconsin, to the trading post of the Northwest

[93] Wisconsin Exhibit 121, Supplement Figure 5.
[94] Wisconsin Exhibit 3, p. 1.
[95] Wisconsin Exhibit 101.
[96] Wisconsin Exhibit 1.

Company at Lac du Flambeau. This route commenced on the east side of the Montreal River, and after following the river for eleven pauses, crossed the river and continued on the southwesterly side of the river until it arrived at Portage or Long Lake. The trail is shown on numerous exhibits and is frequently referred to in the record.[97]

One of the early "factors" of the Northwest Fur Company was one Francis Victor Malhiot, who, in accordance with the custom of the Northwest Fur Company, kept a daily journal of his activities, in which he refers to an expedition along this portage trail from the mouth of the Montreal River to the trading post of Lac Du Flambeau. In this journal he refers to the Rivere des Pins and the Rivere de Sapin, also the Rivere du Milieu,[98] which translated in English mean respectively the Pine River, the Sapin River and the Middle River.[99] Referring then to Houghton's notes of his expedition in 1841 and the map of Captain Cram, we find reference, first, to the Middle River and Hemlock Creek, which have been identified as the present West Branch of the Montreal River. We also find the Gros Pin and the Sapin, apparently the identical names used in 1804 for the identical rivers by Malhiot. This and the fact

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[97] Wisconsin Exhibit 107; Cram's map, Wisconsin Exhibit 121; Wisconsin Exhibit 7; Wisconsin Exhibit 3; Wisconsin Exhibit 301; Wisconsin Exhibit 303; Wisconsin Exhibit 304.

[98] Wisconsin Exhibit 3, vol. 19, Wis. Hist. Colls. pps. 212, 213.

"29th Wednesday. My people did sixteen pauses today although the water was frequently up to their knees, and they complained a good deal. We are camping at the Rivere des Sapins.[3]

31st Friday. 'L'Epaule de Canard' came to us last night; he is coming to the Grand Portage to see Mr. MacGillivaray. Today we were obliged to make a small raft to cross the Rivere du Milieu,[4] and we camped there. I have not seen the water so high for a long time, and I am greatly surprised to see my people hold out so long."

[99] Wisconsin Exhibit 3.

that Houghton was using a French name for these rivers shows clearly that the River Montreal, as he followed it and accepted it, was the River Montreal known for many years before to traders in that region and that this river was made up by the junction of the Pine and Sapin, which is the French for Balsam, and which in recent years has been referred to as Lehman's Creek. The Michigan engineers freely admit that a large part of the information obtained by Captain Cram on his expedition up the Montreal River was from guides, and that without numerous guides it would have been impossible to get all the information obtained in the short time required by Cram.[100]

As a further justification of the conclusion of Captain Cram and Douglas Houghton that the headwaters of the Montreal River were the junction of the Pine and the Sapin, we direct the Court's attention to the fact that the area around the confluence is very swampy,[101] and that in the judgment of the witness Martin common experience would indicate that it was advisable not to have a boundary run through such a swampy area in such small streams if it could be avoided.[102]

In 1820, James Duane Doty, as secretary to General Lewis Cass, who was then Governor of the Territory of Michigan, accompanied Cass on an expedition along the south shore of Lake Superior, and speaks in his accounts of that trip, of a trip along the Montreal River trail, in which he claimed to have crossed this river, first, at the eleventh pause, and, second, at the eightieth pause, and refers to a route along this trail and connecting lakes to "Old Plantation Lake."[1]

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[100] See, for instance, R. p. 214.

[101] Wisconsin Exhibit 7; Wisconsin Exhibits 125–126–127.

[102] R. pp. 660–661.

[1] Wisconsin Exhibit 4.

"The Montreal River is not navigable; but at its mouth, on the east side, a portage is made of one hundred and twenty

Numerous maps published between 1829 and 1836 also show the Montreal River to have been known to extend beyond the confluence of the west branch and the Montreal River. Thus, the map so much relied upon by counsel for the plaintiff shows that the Montreal River extends to the Lake of the Desert, and that extending in a southwesterly direction similar to the West Branch, it has a considerable branch which

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*pauses* to a small lake; in which distance the Montreal River is crossed twice, the first time at eleven *pauses*, and the second at eighty. The lake is three miles long, and is the head of another branch of the Sauteur. This fork runs fifteen miles into Turtle Lake, which is about two miles over, thence it runs a few leagues into a small lake, passing through which it continues on until it joins the fork from Old Plantation Lake, thirty-three miles from Turtle Lake. A lake of considerable size is connected with Turtle Lake on the northeast by a river. In Lake Du Flambeau the Southwest Company have an establishment of five traders and twenty hands, the return from which last season was about fifty packs. It lies from Turtle Lake near southeast. The route is from the mouth of the Montreal to Turtle Lake, from which there is a portage one-fourth of a mile to a small pond, thence up the outlet of a small lake one-fourth of a mile, from which a portage of three miles is made to the Old Plantation River. This is descended eighteen miles to the entrance of the Riveire du Flambeau, which rises in the lake of the same name, and is twenty-four miles long. The Company's fort stands on the north side of the lake. The lake is crooked, is four miles long and one broad. From this there is a chain of lakes which extend down to the head waters of the Ouisconsin. Portages are made from one to another so as to connect the communication in that direction. The small river formed by the junction of the Turtle and old Plantation rivers, is almost entirely a rapid; and, running over a bed of rocks, is very dangerous. It takes seven days to descend it, and is one hundred and seventy-five miles long. The River Sauteur (Chippewa) which is also rapid, is very wide, and about one hundred and eighty miles long, emptying into Lake Pepin. It is sixty-three miles from the Tenaugon to the Montreal River."

[2] Plaintiff's Exhibit 9.

rises in a lake. Referring from this map to a map published by John Farmer, one of the most prominent map publishers and the most authoritative publisher of his time,[3] we find the Montreal River rises in Lac Vieux Desert, and that a tributary stream, bearing the same relation, following the same course as the tributary referred to in plaintiff's Exhibit No. 9, and rising in three lakes, is labeled as the West Branch. The same is true of the Farmer map of 1836, appearing as plaintiff's Exhibit No. 86, and published by John Farmer. Thus, showing again that throughout the period from 1804 to 1836, the Montreal River was known to extend beyond the confluence of the West Branch of the Montreal River and the Montreal River. The record also shows that Senator Lucius Lyon had access to the Farmer maps[4] and counsel in their brief concede that fact.

**Investigations immediately following Michigan's admission confirm the earlier understanding.**

Moreover, the explorations in this region, immediately following the establishment of the boundary by Congress in 1836, show the common and general understanding of what constituted the Montreal River. Thus, Douglass Houghton in 1840 made an investigation of the Montreal River as far as the forty-first pause of the portage trail.[5] In 1841 Houghton went up the Montreal River and passed the mouth of the west branch of the Montreal River which he referred to as Hemlock Creek, and never had any doubt as to which was the Montreal River and which was Hemlock Creek or the west branch of the Montreal River. He also concluded that when he came to the junction of the Gros Pin and Sapin, one hundred pauses

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[3] Wisconsin Exhibit 131.
[4] Plaintiff's Exhibit 22; Plaintiff's Exhibit 49.
[5] Wisconsin Exhibit 7. Journal for August 17, 1840.

from Lake Superior along the portage trail, that point should be considered the headwaters of the Montreal River.[6]

These authentic contemporaneous sources show too clearly to require further argument that to the early fur trader the west branch was a tributary river of the main Montreal, that this latter river was known by the name Montreal far beyond the confluence of these two streams and that it was known by this name as far up stream as the junction of the Pine (Gross Pine of Houghton and Rivier des Pins of Malhiot) and the Balsam (Sapin of Houghton, Spruce of the Indians, Lehman's Creek, its present name). There is not one scintilla of proof in the record to dispute that fact.

Lucius Lyon also made his investigation in 1839 and concluded that Congress had made a mistake in assuming that the Montreal River had the Lake of the Desert as its source. He also establishes the fact by this letter that in arriving at the proper boundary line description, he had referred to one of Farmer's maps, for he stated in a letter under date of February 17, 1840, to Hon. H. D. Turner, a member of the House of Representatives of Michigan, that the "Montreal River, before mentioned, is the west boundary of the country above described. It divides Michigan from the Territory of Wisconsin, and according to *Farmer's map of Michigan and Wisconsin*, has its source in Lac Vieux Desert."[7]

Douglass Houghton, who had been in the vicinity of the Montreal River and along the southwest of Lake Superior, and had ascended several of the more important streams along that shore, at least three times between 1831 and 1832,[8] and who had been in the region along the Montreal River, was not a stranger to the Montreal River, when in 1840 he again commenced his investigations in that vicinity. As is indicated by

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[6] Wisconsin Exhibit 7. Journal for July 25 and 27, 1841.

[7] Wisconsin Exhibit 22, vol. 27, Mich. Hist. Coll. 1896, Letter No. 14, Series No. 5.

[8] Wisconsin Exhibit 25.

his numerous reports, he was continually inquiring about the interior country, and in 1840 became interested in the subject of the boundary because he discovered that the original theory that the Montreal River had its source in the Lake of the Desert was reported to be erroneous.

He, however, was not the only one who was furnishing information about this interior country from that time on down to the present time. A. B. Gray, assistant superintendent and surveyor, under the United States geological survey, describes an expedition through this territory in the summer of 1845. He speaks about crossing a stream, which, from an examination of the maps of that day, and its location in respect to the Montreal trail, was without doubt the west branch of the Montreal river. He speaks about camping at a little stream about twenty feet wide which was undoubtedly Lehman's Creek or the Sapin River, as it was referred to in those days, and on the following morning, at a short distance beyond, they crossed the head stream of the Montreal River, which would be the Pine River.[9]

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[9] Wisconsin Exhibit 6, Exec. Doc. No. 211, 1st Sess. 29th Cong. 1846. Ser. No. 486, p. 2.

"On the afternoon of the 29th the canoes hove in sight, and by sunset a large number of the Indians had encamped on the right bank of the river below us. By 8 o'clock next morning, we were all on the March, Major Campbell and myself being provided each with two able and trusty voyageurs, who had been accustomed to 'pack' and travel through the woods. We were three days and a half making the 'portage' estimated at about thirty-five miles by an old Indian trail from the mouth of the Montreal to 'Portage lake', which latter is the head of a succession of small lakes extending for ten miles, and which are the head waters of some of the tributaries to the Chippewa river.

About two miles along our route from Lake Superior we crossed a high range of trap rock, bearing northeasterly and southwesterly. Descending rapidly half a mile further, we forded the main stream, and continued on the old trail to the southward, leaving the river to the east of us. Some

**Official United States investigations confirm previous understanding.**

Gray's investigation also continued from this point to the Lake of the Desert, and his description of the region between

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ten miles further on, after rising from flat and swampy grounds, we came to another range of trap less distinct and regular than the first, although showing itself bare upon the surface in many places.

Again, in about eight miles, immediately after crossing a small stream running to the east, and which we supposed to be a branch of the Montreal, we ascended a high and elevated dike of trap rock, perfectly bare, with numerous veins of quartz passing through it—some of them from two to three feet in width. The trail passes directly over this range; and from our cursory examination, we judged it well worthy the explorer's attention, and have no doubt, from the surface indications noticed by us, will prove to contain veins of a metalliferous nature similar to those upon Kewaiwona point.

During our travel between the two last ranges, we observed scattered about large and isolated boulders of trap, and of the old red sandstone formation, at some time or other detached from the regular dikes, which appear to be nearly parallel with each other, and ranging in a N. 20 degrees E. and S. 20 degrees W. direction. Having suddenly descended from this last dike, we came to low ground, covered by a sort of prairie grass, with occasional groups of tamarack and spruce. A mile or two further we crossed a deep running stream, flowing easterly, 20 feet wide, and slightly colored red, though perfectly clear. Here we found one of the bands of Indians who had got ahead of us, their packs upon the ground, with their lines out, and having already caught a number of fine fish. This stream we took to be one of the main branches of the Montreal, and was represented as heading in several small lakes abut ten miles to the southwest. Pursuing our journey, we rose gradually upon a high granitic range of hills, the rock showing itself in many places; and, continuing in a southeasterly course, we came to another bold and rapid stream, 20 feet wide, flowing to the east, with a bed composed of heavy masses of trap and granite; encamped immediately on the south bank; the ground flat and moist. The next morning, about a mile and a half to the south, crossed the head stream of the Montreal, of about the same width, but sluggish, hav-

the headwaters of the Montreal River and the Lake of the Desert furnished additional official information about this inland country.

In 1848 David D. Owen, United States geologist, submitted his report covering his operations for the summer of 1847. His journal again describes the investigations of his party along the course of the Montreal River trail. More than that, he also refers to the party, under state geologist Whitney of Michigan, being encamped a short distance from the mouth of the Montreal River, while making their surveys in that region. He again refers to crossing the West Branch of the Montreal River, and then crossing the Montreal River two days later.[10]

In 1848 C. T. Jackson, United States geologist, also went through this same region in making a trip to Lac Vieux Desert, and refers to the camp of the Montreal River Mining Company, then in operation on lease No. 19, which, as appears from Wisconsin Exhibit No. 107, was a short distance from the mouth of the Montreal River.[11]

The journal of W. Gibbs, referred to in the report of Foster & Whitney, United States geologists, who explored the vicinity of the Montreal River in 1848, again gives considerable information with reference to the extended investigations that had been made in that region, and shows the surveyor Burt was still in that country conducting his investigations.[12]

In the Michigan survey of 1849 the approach of the West

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ing alder bushes, with a fine grass meadow, on either side of for 600 feet. Four miles more slight elevations and occasional swamps, brought us to the 'Portage lake' of the Mississippi waters."

[10] Wisconsin Exhibit 12, Journal for September 21 and 23, 1847. Sen. Doc. 30th Cong., 1st Sess. Serial No. 509.

[11] Wisconsin Exhibit 13, Sen. Doc. 1st Sess. 31st Cong., Vol. 3, Serial No. 551.

[12] Wisconsin Exhibit 14, Exec. Doc. No. 5, 1st Sess. 31st Cong. Ser. No. 571.

Branch is shown,[13] and in the Wisconsin survey of 1863 (Wisconsin Exhibit 197, sheet (6) the same West Branch is again shown, in each instance, however, approaching it at a different angle than at the present time.

**Investigations by state geologists also confirm early understanding.**

In 1860 Winchell's report of his geological survey of Michigan covered the geology of the region in the Menominee River and demonstrates the extensive official information obtained about this region by that time.[14]

The report of Lucius L. Hubbard, state geologist of Michigan, on the upper peninsula, covering 1881 to 1884, refers to investigations made along the Montreal River, and shows that Hubbard had proceeded across the Montreal River as far as the west branch of the Montreal River, which he refers to as the Gogogashugun River, and which is identified in the record by numerous maps and other references as the west branch of the Montreal River.[15]

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[13] Wisconsin Exhibit 109 Sheet (2) Wisconsin Exhibit 197 Sheet 3) See facing p. 142 of this brief.

[14] Wisconsin Exhibit 17.

[15] Wisconsin Exhibit 20, Geological Survey of Michigan.

"From the Montreal River I followed the iron-bearing rock belt into Wisconsin, which was the shortest way to get out of the woods and more instructive than my return by the same way I came would have been. Crossing Gogogashung River at the south end of an island the river incloses, I had an excellent opportunity to see a very large succession of beds representing the lower horizons of the iron-bearing rock series, as the river had carved its channels across this group of beds. It rushes over them in rapids and a number of smaller cascades, in both of the arms enclosing the island, while above the island a large body of underlying schistose dioritic rocks form the bed of the river. The schists above the dioritic form well luminated, even and compact beds of slatelike fissility; their colors are rather light, varying in all shades from gray to greenish, bluish, reddish, brownish; they consist of a fine-

The chief geologist of the State of Wisconsin in 1878 likewise made extensive investigations along the Montreal River, and again describes the Gogogashugun and the Montreal River by its early Indian name Wasijiwang zibi, stating that "the Montreal River * * * drains a much smaller area than Bad River, but, though not carrying so much water as the lower Bad, is often as broad a

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grained, silico-foldspathic mass, charged with a greater or smaller proportion of minute mica scales; from time to time coarser arenoceous seams mingle in between the fine-grained, slaty laminae. The aggregate thickness of this belt amounts to about 300 feet; the dip of the strata is north, under an angle of about fifty degress. Reposing on them is a series of quartzite beds partly in thick layers, but most of them thin, flaggy and in alternation with softer argillitic seams. All these beds are more or less impregnated with oxide of iron, either merely as a pigment or also as larger concretionary seams of iron ore, limonitic or hematitic. These ores accumulations occur principally in a part of the belt in which the ledges are found shattered into small, angular fragments and recemented into breccia by these infiltrated ore masses, which, however, accumulated also in the not so much shattered portion of the quartzrock series. What succeeds north of this belt I have not examined, as an accurate geological description of the environs of this place is given in the reports of the Wisconsin Geological Survey.

Two miles farther west, in the north half of Sec. 33, T. 46, R. 2 E, Wisconsin, explorers have opened a large number of test-pits and longer tranches across the stratification. In these we see farthest south, next to granite bluffs, the same light colored slate-rock series which forms the river bed of Gogogashung River, in the circumference of the island. Above the slates, thick-bedded light colored quartzite layers and then more thinly luminated, jaspery beds of reddish or brownish color follow. Within this rather wide belt of quartzose beds, irregular seams of iron ore parallel to the stratification and in transverse seams and pockets have been laid open, of which some promise to be valuable. This ore is a compact, fine-grained, aphanitic mass of purplish black color, with a smooth, flinty fracture, and in association with its concretions of grape ore are of frequent occurrence."

stream, especially after the reception of its main branch, the Gogogashugun. The total area drained by the Montreal, in Wisconsin, is about 177 square miles. Since it forms, for a large portion of its course, the boundary between Wisconsin and Michigan, "a large part of its drainage area lies within the latter state. The *main tributary* of the Montreal, the Gogogashugun, is nearly as large a stream as the *upper* Montreal itself, and receives a much larger share of the entire drainage area of the Montreal, as far as Wisconsin is concerned.[16]

Again referring to the West Branch of the Montreal River, the chief geologist says "the Gogogashugun River ('river crossed by a fallen, swaying tree') is the *main tributary* of the Montreal, and may quite properly be regarded as one of the two forks that unite to form the lower Montreal."[17]

The quotations referred to, in fact the entire exhibit, show the very extensive investigation and development in the region of the Montreal River as early as 1878. About the same time Irving and Van Hise undertook their work in the same region in behalf of the United States, and prepared a map showing the detailed geology of the Penokee district. Sheet IV of this detailed geology shows both the Gogogashugun, which is there called the west branch of the Montreal River, and the Montreal River passing through between the village of Ironwood and Hurley. It also shows the extensive development in this region, there being at that time three different railroad lines running through Hurley and Ironwood.[18]

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[16] Wisconsin Exhibit 18, Geology of Wisconsin, by Chief Geologist, Survey of 1878–79, Vol. 111. Chap. 1.

[17] Wisconsin Exhibit 18, Geology of Wisconsin, by Chief Geologist, Survey of 1878–79, Vol. 111. Chap. 1.

[18] Wisconsin Exhibit 110.

**The United States government surveys allotted disputed area to Wisconsin.**

The early United States' government surveys allot to Wisconsin all the territory between the west branch and the Montreal River, and Exhibit No. 109 contains the various township plats showing these surveys. In map No. 1 of this exhibit is shown the old portage trail. Map No. 2 shows the mouth of the west branch coming into the Montreal River considerably below the curve made by the Montreal River, which shows that between 1863, when these surveys were made, and the present time, changes have taken place in this confluence, from which no one can now say that the conditions existing there at present are the same or nearly the same as those that existed at the time the boundary line was established.[19] Maps numbers 3, 4, 6, 7 and 8 show the portage trail, and map No. 4 again shows the west branch of the Montreal River, though it does not assign any name to it. Map No. 7 shows the astronomical station established by Captain Cram in conjunction with commissioner Douglass Houghton, representing the State of Michigan. It also shows the mile posts established by Burt in his survey, and described in his report of his survey.[20] Map No. 9 of Exhibit 109 also shows the end of the portage trail in section 18 at the shore of Turtle Lake. All mile posts between the astronomical station shown in map No. 7 and extending from there to range 4 East were indicated along the boundary line.

The foregoing exhibits demonstrate clearly that just prior to 1836, the west branch of the Montreal River was regarded as a fork or tributary of the Montreal River which it joined at the confluence and not as the main stream. So after 1836, the same understanding prevailed, and persons

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[19] See Brief pp. 141–144 for fuller discussion and references to maps.

[20] Wisconsin Exhibit 11.

going through that region all testified to the same fact. Numerous maps show that the west branch is a smaller stream. Some of the geologists testify to the same effect, or at least that it is substantially the same size.

**Indian residents of district confirm early understanding.**

In addition to this evidence, however, the testimony of Indians, who formerly travelled the portage trail from Lac du Flambeau to Lake Superior, is that they frequently went along the portage trail from Long Lake to Lake Superior. George Sky, age seventy,[21] travelled this route when about seventeen years of age. In the summer of 1924, he again went over the route and had no difficulty in finding the trail. He testified that their hunting grounds were between the Gogogashugun and Long Lake.[22] He also stated that the river between the Pine and Gogogashugun, which is the present Lehman's Creek, was known as "Ininandugosebi," which was translated to mean the Spruce or Balsam. Jim Bell No. 2, known by the Indian name of NeGani Gi Zig, also over seventy years of age, testified[23] that he is one of the Chiefs of the Indians of Lac du Flambeau; that he knew the tribe went from Lac du Flambeau to Lake Superior, following the old portage trail,[24] and from that time on followed the trail once or twice a year. He stated that he followed it in 1924, and showed it to Mr. Halbort, an engineer representing the State of Wisconsin,[25] and that the trail was easy to find because of depressions in the ground the same as in the early days.[26] The witness Aldrich also testified that in company with the Indians, he

[21] Transcript, p. 441.
[22] Transcript, p. 444.
[23] Transcript, p. 452.
[24] Transcript, p. 453.
[25] Transcript, p. 454.
[26] Transcript, p. 455.

found the old portage trail, and that it is located on Wisconsin Exhibit No. 355 just as they found it when they made their examination.[27]

Upon this record how can anyone claim that the West Branch is anything else than a branch, and as such how could it be considered by the boundary line surveyors when they were told to follow the Montreal River.

**The claim of the State of Michigan that the West Branch of the Montreal River is the larger stream is not supported by the evidence, and the great preponderance of the evidence shows that the West Branch is in fact the smaller of the two streams.**

INVESTIGATION BY MICHIGAN ENGINEERS IN 1920.

A great deal of evidence was taken to show that the West Branch of the Montreal River was the larger of the two streams. The witnesses, Rupp and Burridge, testified at considerable length to the effect that the West Branch of th Montreal River was the larger stream. In the report of these engineers made to the boundary line commission of Michigan,[28] they state that:

> "If Captain Cram, who made the original government survey of this boundary, had followed the instructions of Congress by starting from the mouth of the Montreal and working up stream, your engineers do not think that he would have ever taken the East Branch as the main channel of the stream, for at the junction of the two branches of the river, the west branch is clearly the main river which the east branch enters at an angle and splints into four small branches forming several small islands at the junction."[29]

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[27] Transcript, p. 545–546.
[28] Plaintiff's Exhibit 170.
[29] Plaintiff's Exhibit 170.

While we feel that this evidence is entirely incompetent and immaterial, we will set it forth because under the most favorable view that may be taken of it so far as plaintiff's case is concerned, it has failed to establish anything. It is incompetent because it describes conditions nearly one hundred years after the boundary was established, conditions existing when settlement and development have removed entirely the primeval conditions existing along these rivers when the boundary was established. It is immaterial because the channel contemplated by the Michigan Statehood Act had no relation to quantity of flow in deciding between different streams, there being in existence at the time a river extending from below the confluence to points far up stream from the confluence which was known as the Montreal River, and which made the question of the relative size of feeding streams bearing different names entirely immaterial. Under those circumstances it would have been improper to consider the volume of water in deciding between the west branch and the Montreal River.

The witness Rupp bases the quoted opinion above on the fact that he found a log jam in the East Branch and none in the West Branch.[30] The statement of course disregards every element except stream flow volume and the opinion is based upon conditions on one particular day with no evidence in the record specifically showing the stage of water or other important considerations.

He admitted, however, that the so-called East Branch of the Montreal River had the larger drainage area, unless the drainage area of Spring Creek was deducted.[31] He claimed that Spring Creek dried up in the summer time since Ironwood started to pump water out of its bed, but does not know what the conditions were before.[32] He also admitted that the drain-

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[30] R. P. 257.
[31] Transcript, pp. 166, 167.
[32] Transcript, pp. 225, 226..

age area of the Montreal River is cleared more and there is more development in it than in the West Branch.[33] Though not familiar with taking stream measurements, they did undertake to measure the flow in the two streams by what is commonly known as the float method,[34] but took it up stream from the confluence six or seven miles, though they admitted that the fair way of making comparisons was by taking measurements at the confluence.[35] They also stated that the percentage of error from the method used by them should not exceed 10%,[36] yet when their stream flow measurements are checked against those of the United States Geologival Survey for the same day, we find a difference of over 100% between the engineers' method, admittedly less accurate, and the more accurate United States method.[37] In arriving at their drainage area estimate, they adopted the original government surveys.[38] They also prepared a sketch of the confluence of the streams,[39] and claim that a large log jam was located on the East Branch, but none on the West Branch.[40] The witness Rupp did not know if some of the islands shown in their sketch were located in the West Branch,[41] nor did they take any soundings at the confluence of the two streams. (R. 243.) They did not know on which side of the islands at the confluence the largest amount of water flowed,[42] but claim that a considerable amount of water was flowing through the westerly channel or branch of the West Branch at the confluence.[43] They made

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[34] Record pp. 232, 234.
[35] Record p. 234.
[36] Record p. 195.
[37] Record pp. 765, 766.
[38] Transcript, p. 235.
[39] Plaintiff's Exhibit 171.
[40] Plaintiff's Exhibit 170.
[41] Transcript, p. 243.
[42] Transcript, p. 244.
[43] Transcript, p. 244.

their observations at the confluence all in one day,[44] and admitted that conditions at the confluence were such that they would expect repeated gradual changes which have been frequent during the period from 1840, and that no one could judge the actual conditions at the confluence in 1840.[45] He admitted that the water in the vicinity of the islands at the confluence was not deep enough to paddle a canoe through it,[46] but he did not know whether a canoe could run along the easterly shore at the confluence, that is, along that part through which the waters of the East Branch of the Montreal River are discharged.[47] He did know that a canoe could not run along the westerly shore at the confluence when they were there because the water was too shallow.[48]

Burridge admitted that the Cram map[49] was approximately correct, but that the government surveys are correct; also that Hemlock Creek, shown on the Cram and Houghton maps, was the West Branch of the Montreal, and was the same as what Houghton called the Middle River.[50] He also testified that Hemlock Creek in the Houghton sketch,[51] and Middle River in the Cram sketch were the same.[52]

In determining the drainage area of the two streams, upon which plaintiff's Exhibit 120 is based, the area between branches from different drainage areas was divided evenly and is, therefore, only an approximation. (R. 235, 192) On that basis, however, they determined the drainage area of the East Branch to be 112.28 square miles, above the confluence of the East Branch and West Branch, and that of the West Branch

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[44] Transcript, p. 246.
[45] Transcript, pp. 247–248.
[46] Transcript, p. 248.
[47] Transcript, p. 249.
[48] Transcript, p. 249.
[49] Wisconsin Exhibit 121.
[50] Transcript, p. 155.
[51] Wisconsin Exhibit 7.
[52] Transcript, p. 156.

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above the same confluence to be 96.6 square miles.[53] They measured the stream flow of the two streams on October 23, 1920, making the observation only on one day, and admitted that the float method employed by them was not as accurate as the United States government method of gauging streams.[54] He also admitted that observations made from June to October or November would reflect more accurate relative conditions of the streams than the investigations made by him and Rupp. He also claimed that Spring Creek, which he claimed should be disregarded in determining the relative drainage areas of the two streams, should be disregarded even though it was not dry when he examined it,[55] and without knowing whether Spring Creek would hold back the flow of water or not. In joining in the conclusions contained in plaintiff's Exhibit No. 170, he did so not knowing the effect of the farm developments in the Montreal River valley or the building of railroad rights of way and the effect of such improvements upon drainage, although it was his conclusion that they would generally result in more rapid running off of the water.[56] In his opinion the channel along the westerly shore of the West Branch was the place of main discharge, and no obstructions were found by him in the West Branch.[57] They did not determine the relative flow per square mile of drainage area in the two streams. He also admitted that undoubtedly numerous guides accompanied the Cram party, and that if he were looking for the Montreal River he would probably take the guide's word as to which was the Montreal River[58] in place of determining it on the basis of the quantity of water discharged.

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[53] Transcript, p. 192.
[54] Transcript, pp. 194–195.
[55] Transcript, pp. 197, 198.
[56] Transcript, pp. 200–205.
[57] Transcript, p. 209.
[58] Transcript, p. 214.

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**Michigan proof does not support allegations of her complaint.**

Upon this evidence the State of Michigan contends that it was shown that the West Branch was the larger of the two streams, though there is some evidence in the record that an examination by one Cannon in 1885 discloses a similar fact. The fact, however, remains that the examinations at the confluence made by Michigan's representatives never exceeded a day, and in most instances less than that time, and there is no evidence in the record as to the comparative size of the two streams in 1836 except evidence which contradicts the claims of Michigan. Plaintiff also offered a stream flow study made for the State of Wisconsin by the United States Geological Survey of both streams at points far above the confluence. The one on the West Branch was taken at Gile some distance west of Hurley, the other on the Montreal River at Ironwood, Michigan. These studies were made for the purpose of advising the mining companies as to the flow of these streams, should subsequent developments of these mines make it necessary to take some precautionary steps to prevent the water from these rivers discharging into the mines because of cave-ins or conditions of similar nature.[59] At the points where these studies were made the drainage area of the West Branch above such point was 78 square miles, that of the Main Montreal River 66 square miles,[60] while at the confluence of the West Branch and the Montreal River, the drainage area of the West Branch was 96 square miles, and that of the Montreal 109 square miles.[61] In other words, at the Ironwood station on the Montreal River but little more than one-half of the drainage area of the Montreal River was considered, while all but 18 square miles of the total drainage area of the West

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[59] R. p. 493, 581–582.
[60] R. p. 481.
[61] R. p. 805.

Branch of the Montreal River were taken into consideration. On that basis at those stations the West Branch of the Montreal River showed an average discharge somewhat greater than the Montreal River.

Upon this showing the state of Michigan proposes to overthrow the judgment of their representative Douglass Houghton and the judgment of Captain Cram formed after a careful examination of the two streams in 1841, to override the judgment of Prof. Davis, a special investigator and employee of Michigan, to overthrow the accepted understanding of which stream the boundary line properly followed throughout the period from 1836 to the time of the commencement of this suit. To our mind this evidence is entirely too flimsy to sustain any such contention.

**Overwhelming weight of evidence negatives claim of Michigan.**

However, the record in this case makes it unnecessary to decide this issue on failure of proof. There is so much evidence which conclusively shows the error of the Michigan representatives that we submit there can be no finding other than that the Montreal River, accepted by Houghton, accepted by Cram, adopted by Congress and recognized by Michigan and Wisconsin since 1836, is the proper boundary line stream between these two states.

To counteract the proof as to the drainage area submitted by Michigan, the State of Wisconsin made a careful study of the maps which the State of Michigan offered, and the early government surveys upon which the Michigan representatives stated they were based. The Wisconsin representatives thereupon prepared what has been referred to in this record as a corrected drainage area map of the Montreal River basin based upon the early government surveys.[62] The exhibit

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[62] R. p. 510 51–512, Wisconsin Exhibit 350.

shows in the heavier white lines omissions of streams found in the original government maps, which materially affect the drainage of the two streams. At numerous places white brackets have been placed in the map which indicate that parts of streams were added which were not shown upon the original government surveys, and having made these corrections, the Wisconsin engineer then showed with red ink reductions and changes in the drainage area made by him. This correction has never been disputed, though some intimation has been made that the engineers, in giving their testimony and making their report to the State of Michigan, overlooked the fact that the map which they produced[63] was prepared both from government plats and from actual study of the ground, and was, therefore, more accurate than the original government survey. Be that as it may, the corrections made by Wisconsin's representatives shows material discrepancies in the determination of the actual drainage area.

The Michigan engineers also failed to give proper consideration to the pumpage from the mines, their theory being that because the water was pumped from below the level of the streams, it would not ordinarily re-enter the mine. The Wisconsin engineers conceded that, but claim that but for the presence of these mines, the ground water level would be so high that seepage to the levels from which the water is now being pumped in these mines would be prevented, and the water in place of descending to the levels from which it is being pumped at this time would flow off and down the respective rivers, at least to a large degree. This is confirmed by the witnesses Hotchkiss and Halbert.[64] The difference in the amount of water discharged into the two drainage basins by mine pumpage, when finally checked up, was so small as not to make a perceptible difference in the flow, even though

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[63] Plaintiff's Exhibit 170.

[64] R. P. 753–760.

it be assumed that this water augmented the flow of the streams to the extent of such pumpage,[65] the testimony of Mr. Halbert being to the effect that the pumpage into the Montreal River represented normally 2.8 cubic feet per second, and the pumpage into the West Branch 1.9 cubic feet per second.[66]

The testimony of Mr. Halbert also was that in his judgment the pumpage represented to a large degree water which would ordinarily find its way into the respective rivers under normal conditions.[67].

The engineers for the State of Michigan also claimed that

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[65] R. P. 757.

[66] R. P. 757.

"Now, I have taken the normal pumpage on the West Branch of the Montreal River as 800 in case of the Montreal and 70 in the case of the Carey Mine, making a total of 870 gallons per minute, which represents a flow of 1.9 cubic feet per second, substantially. So that we have being pumped by the Mines into the Montreal River normally 2.8 cubic feet per second and into the West Branch of the Montreal River 1.9 cubic feet per second.

MR. RIESER: Will that make any difference in the flow so that any one looking at the streams could tell any difference?

A That would not make a perceptible difference in flow even though it were assumed that this water augmented the flow of the streams to this extent."

[67] R. p. 758.

"Q What is your opinion as to whether or not it actually does augment?

A That matter has been touched by Mr. Hotchkiss who testified before me in this matter, and in addition to that, I think it is quite evident that certainly this water must come from the surface or at least a substantial part of it, due to the fact that during the freshet months of run off during April and May, the pumpage increases from 30% to 50%. I might add that the flush pumpage runs usually in April, May and June—June, if you will observe the pumpage in the Davis Group, you will observe that June is as high as April or May."

Spring Creek, being dry now above the pumping station at Ironwood, at certain seasons of the year since Ironwood was pumping water out of its drainage basin, should be entirely disregarded in determining the drainage areas of the two streams, and that by so disregarding the drainage areas of Spring Creek, the drainage area of the West Branch of the Montreal River would be larger than that of the main Montreal. A study of conditions, however, at this stream shows that in October, 1924, the flow from this stream into the main Montreal was 3.6 cubic feet per second,[68] that on August 12, 1924, it was 27.2 cubic feet per second,[69] and that on July 27, 1925, it was 1.46 cu. ft. per sec.[4a] Considering that the normal average flow of the Montreal River would be about 40 cubic feet per second, and the normal flow of the West Branch would be from 30 to 35 cubic feet per second,[4] it becomes, of course, immediately apparent that not only would it be improper to eliminate Spring Creek from the drainage area of the Montreal River, but it would indeed be entirely unfair, and after all should the work of Dr. Houghton and Captain Cram which has been accepted for over 75 years be destroyed by a process of eliminating feeding streams to the Montreal River in order that the drainage area of the Montreal River may be reduced sufficiently to sustain the theory of the Michigan engineers that the West Branch is the larger river?

The Michigan engineers also testified with reference to the relative size of the West Branch of the Montreal River and the Montreal River at the two gauging stations at Gile and at Ironwood. In their testimony, however, they disregard corrections made by the United States Geological Survey following a study of the drainage areas of the two streams, such cor-

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[68] R. p. 750.
[69] R. p. 504.
[4a] R. p. 890.
[4] R. p. 762.

rection being shown in a foot note accompanying Plaintiff's Exhibit 108.[70] In a study of one day with a method of gauging stream flow which the Michigan engineers estimated should not show an error of not more than 10 per cent, they found the flow at a point above the gauging station at Gile and about ten miles from the confluence to be 75.04 cubic feet per second, and on the Montreal River at a point above the gauging station at Ironwood to be 62.53 cubic feet per second This measurement was taken on October 23, 1920.[71] On that date the United States government stations were taking measurements using a system of measurement conceded by Michigan Engineers to be more accurate than that employed by them, as is shown by Plaintiff's Exhibit 108, which show that the flow in the West Branch of the Montreal River at Gile on that date was 24 cubic feet per second, and that of the Montreal River was 31 cubic feet per second. Thus, while the measurements made by the Michigan engineers showed the flow greater in the West Branch than in the Montreal River, the more accurate method of measuring employed by the United States government showed directly the opposite result. Moreover, in place of 75.04 cubic feet per second of water flowing in the West Branch, there were only 24 cubic feet, less than one-third of the amount found by the Michigan engineers, and in the Montreal River, in place of 62.53 cubic feet of water flowing per second, as determined by the Michigan engineers, there were actually 31 cubic feet per second or about one-half as much water.

As against the float measurements made by the Michigan engineers on a single day and which have been demonstrated to be inaccurate by the foregoing analysis of their testimony and the comparison of their results with the results obtained by the United States Geological Survey, are the records of the

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[70] R. p. 481.
[71] R. p. 765.

measurements taken by the United States Geological Survey in cooperation with the Railroad Commission of Wisconsin at the confluence.[74] The average run-off shown from week to week, month to month and for the entire period during which the measurements were being taken, shows that with few exceptions the west branch of the Montreal River had less water flowing in it than did the Montreal River, and that this record entirely negatives the assertions made by the Michigan engineers that it was very evident that the West Branch was the larger stream.

The Michigan engineers also admitted that their sketch[72] of the confluence of the West Branch and the Montreal River produced at the hearing was made as a result of one day spent at the confluence of the two streams, and was a *rough* drawing of the situation that they found. Comparing that rough drawing or sketch with the Exhibits 120 and 120a, produced by Wisconsin, and demonstrated to be correct by the photographs. Exhibits 122 to 127, inclusive, it becomes immediately apparent that the Michigan report of the conditions existing at the confluence of the streams on the date of their investigation is as inaccurate as was their report of the observations and measurements of stream flow taken at Gile and Ironwood. Several witnesses representing the State of Wisconsin testified as to the conditions at the confluence of the two streams. Every one testified that there could not have been changes at the confluence between 1920 and 1924 to account for the differences that exist between Plaintiff's Exhibit 171 and Wisconsin's Exhibits 120 and 120a.[73]

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[74] Wisconsin Exhibit 358.

[72] Plaintiff's Exhibit 171.

[73] R. pp. 598, 599, 600, 822.

"A It is inacurate as to the shapes and sizes of the islands; it is inaccurate as to the course of the streams. If, as I understand, it purports to show the permanent banks of the streams, it is inacurate in showing that. What is labeled on

**Comparison of Mean Weekly Discharge of Montreal River Above Mouth of West Branch and West Branch Montreal River above Mouth from June 26, 1924 to November 15, 1924 from Daily Discharge Records by U. S. Geological Survey.**

| WEEK ENDING | MEAN WEEKLY DISCHARGE CUBIC FEET PER SECOND | | PER CENT |
|---|---|---|---|
| | Montreal above mouth of West Branch Montreal | West Branch Montreal above mouth | Montreal Discharge / West Branch Discharge |
| June 28 (3 days) | 31.3 | 18.7 | 167 |
| July 5 | 47.9 | 39.0 | 123 |
| July 12 | 33.9 | 21.9 | 155 |
| July 19 | 32.4 | 25.1 | 129 |
| July 26 | 33.1 | 24.7 | 134 |
| August 2 | 35.9 | 35.3 | 102 |
| August 9 | 143.9 | 185.3 | 77.7 |
| August 16 | 64.0 | 69.6 | 92.0 |
| August 23 | 93.6 | 69.0 | 136 |
| August 30 | 64.1 | 105.6 | 60.7 |
| September 6 | 32.7 | 29.4 | 111 |
| September 13 | 23.3 | 20.1 | 116 |
| September 20 | 34.3 | 27.6 | 124 |
| September 27 | 53.9 | 47.4 | 114 |
| October 4 | 60.6 | 63.3 | 95.7 |
| October 11 | 126.9 | 104.4 | 122 |
| October 18 | 73.7 | 57.4 | 128 |

| WEEK ENDING | MEAN WEEKLY DISCHARGE CUBIC FEET PER SECOND | | PER CENT |
|---|---|---|---|
| | Montreal above mouth of West Branch Montreal | West Branch Montreal above mouth | Montreal Discharge / West Branch Discharge |
| October 25 | 39.9 | 29.0 | 138 |
| November 1 | 28.9 | 19.6 | 147 |
| November 8 | 26.3 | 19.7 | 134 |
| November 15 | 92.3 | 76.9 | 120 |
| November 22 | 53.6 | 69.3 | 77.3 |
| November 29 | 95.3 | 103.0 | 92.5 |
| December 6 | 70.1 | 54.4 | 129 |

**Comparison of Mean Weekly Discharge of Montreal River Above Mouth of West Branch and West Branch Montreal River Above Mouth from April 2 to July 27, 1925 from Daily Discharge Records by U. S. Geol. Survey.**

| WEEK ENDING | MEAN WEEKLY DISCHARGE CUB C FEET PER SECOND | | PER CENT |
|---|---|---|---|
| | Montreal above mouth of West Branch Montreal | West Branch Montreal above mouth | Montreal Discharge / West Branch Discharge |
| April 4 (3 days) | 312 | 258 | 121 |
| April 11 | 199 | 199 | 100 |
| April 18 | 123 | 139 | 88.5 |
| April 25 | 184 | 153 | 120 |
| May 2 | 137 | 134 | 102 |
| May 9 | 48.9 | 50.4 | 97.1 |
| May 16 | 35.7 | 28.4 | 126 |
| May 23 | 31.7 | 27.0 | 117 |
| May 30 | 29.6 | 22.6 | 131 |
| June 6 | 32.4 | 26.9 | 120 |
| June 13 | 31.7 | 22.6 | 140 |
| June 20 | 37.1 | 24.6 | 151 |
| June 27 | 24.1 | 14.4 | 167 |
| July 4 | 21.1 | 12.1 | 174 |
| July 11 | 14.9 | 8.49 | 175 |
| July 18 | 10.2 | 6.14 | 166 |
| July 25 | 7.46 | 4.10 | 182 |
| July 27 (2 days) | 5.80 | 3.10 | 187 |

**Monthly Discharge of Montreal River Above Mouth of West Branch for the Period June 26, 1924—July 27, 1925.**

**Drainage Area 109 Square Miles.**

| Month | Discharge in Second-Feet | | | | Run-off | |
|---|---|---|---|---|---|---|
| | Maximum | Minimum | Mean | Per sq. mi. | Inches | Acre—ft. |
| 1924 | | | | | | |
| June 26-30 | ..... | ..... | 38.4 | .352 | .07 | |
| July | 60 | 28 | 35.7 | .328 | .38 | |
| August | 232 | 32 | 86.4 | .793 | .91 | |
| September | 72 | 21 | 38.1 | .350 | .39 | |
| October | 180 | 26 | 68.0 | .623 | .72 | |
| November | 187 | 22 | 66.9 | .614 | .69 | |
| December 1-8 | ..... | ..... | 57.5 | .528 | .16 | |
| 1925 | | | | | | |
| April 2-30 | ..... | 80 | 183 | 1.68 | 1.81 | |
| May | 69 | 28 | 37.9 | .348 | .40 | |
| June | 48 | 23 | 30.6 | .281 | .31 | |
| July 1-27 | ..... | ..... | 11.8 | .108 | .11 | |

**Monthly Discharge of West Branch Montreal River Above Mouth, for the Period June 26, 1924 to July 27, 1925.**

**Drainage Area 96 Square Miles.**

| Month | Discharge in second-feet | | | | Run-off | |
|---|---|---|---|---|---|---|
| | Maximum | Minimum | Mean | Per sq. mi. | Inches | Acre—ft. |
| 1924 | | | | | | |
| June 26-30 | ------ | ------ | 27.8 | .290 | .05 | |
| July | 55 | 21 | 26.9 | .280 | .32 | |
| August | 248 | 21 | 102 | 1.06 | 1.22 | |
| September | 72 | 19 | 34.1 | .355 | .40 | |
| October | 140 | 18 | 54.8 | .571 | .66 | |
| November | 161 | 18 | 66.6 | .693 | .77 | |
| December 1-8 | ------ | ------ | 42.6 | .443 | .13 | |
| 1925 | | | | | | |
| April 2-30 | | 72 | 172 | 1.79 | 1.93 | |
| May | 82 | 21 | 34.6 | .360 | .42 | |
| June | 35 | 13 | 21.2 | .221 | .25 | |
| July 1-27 | ------ | ------ | 6.79 | .071 | .07 | |

**Comparison of Mean Monthly Discharge of Montreal River Above Mouth of West Branch and West Branch Montreal River Above Mouth from June 26, 1924 to July 27, 1925 From Daily Discharge Records by U. S. Geol. Survey.**

| MONTH | MEAN MONTHLY DISCHARGE CUBIC FEET PER SECOND | | PER CENT |
|---|---|---|---|
| | Montreal above West Branch Montreal | West Branch Montreal above mouth | Montreal Discharge / West Branch |
| 1924 June 26-30 | 38.4 | 27.8 | 138 |
| July | 35.7 | 26.9 | 133 |
| August | 86.4 | 102 | 84.7 |
| September | 38.1 | 34.1 | 112 |
| October | 68.0 | 54.8 | 124 |
| November | 66.9 | 66.6 | 100 |
| December 1-8 | 57.5 | 42.6 | 135 |
| 1925 April 2-30 | 183 | 172 | 106 |
| May | 37.9 | 34.6 | 110 |
| June | 30.6 | 21.2 | 144 |
| July 1-27 | 11.8 | 6.79 | 174 |
| Whole period of record | 61.3 | 56.6 | 108.3 |

Mr. Halbert also testified that in his judgment Plaintiff's Exhibit 171 could not have been accurate in 1920 considering present conditions, his judgment being based on his observations made in 1924 and 1925 during which time careful examinations were made.[78]

The Michigan engineers based their conclusion that the West Branch was the main Montreal River on the fact that they considered it was the larger stream, but largely on the fact that in coming upstream from the mouth of the Montreal River because of the bend made in the river at the confluence, it would be more natural to follow up the westerly channel of the West Branch as it comes into the Montreal River, in place of going around the curve.[79] This conclusion, of course, was based on their investigations made

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the map as the 'East Branch' comes in from the southeast and there is shown a strong re-entrant to the east where this river comes in to the north end of the mass of islands shown on the map, which never was there on the ground within recent years because of the conformation of the country there. The three small islands just to the north of the mouth of what is labeled East Branch, although inaccurately sketched are presumably gravel bars as shown in some of the photographic exhibits, which would be covered by any such stage of water as would be sufficient to fill the outer banks as indicated on the map, so that it is not a correct portrayal of the stream either in high or low water. I might state further that I make this statement by comparing this map with the actual photographs of the area shown here, which are Defendant's Exhibits 122–122a. There is a further inaccuracy, which is very clear, shown in the photographs in Exhibit 122. Photographs lettered 'E'. This photograph was taken from the Northeast bank of the main channel and looks up the West Branch.

There is no point on this map, Plaintiff's Exhibit 171—there is no place on that map from the northeast bank of the stream, where such a photograph could be taken as indicated on this map."

[78] R. p. 822.

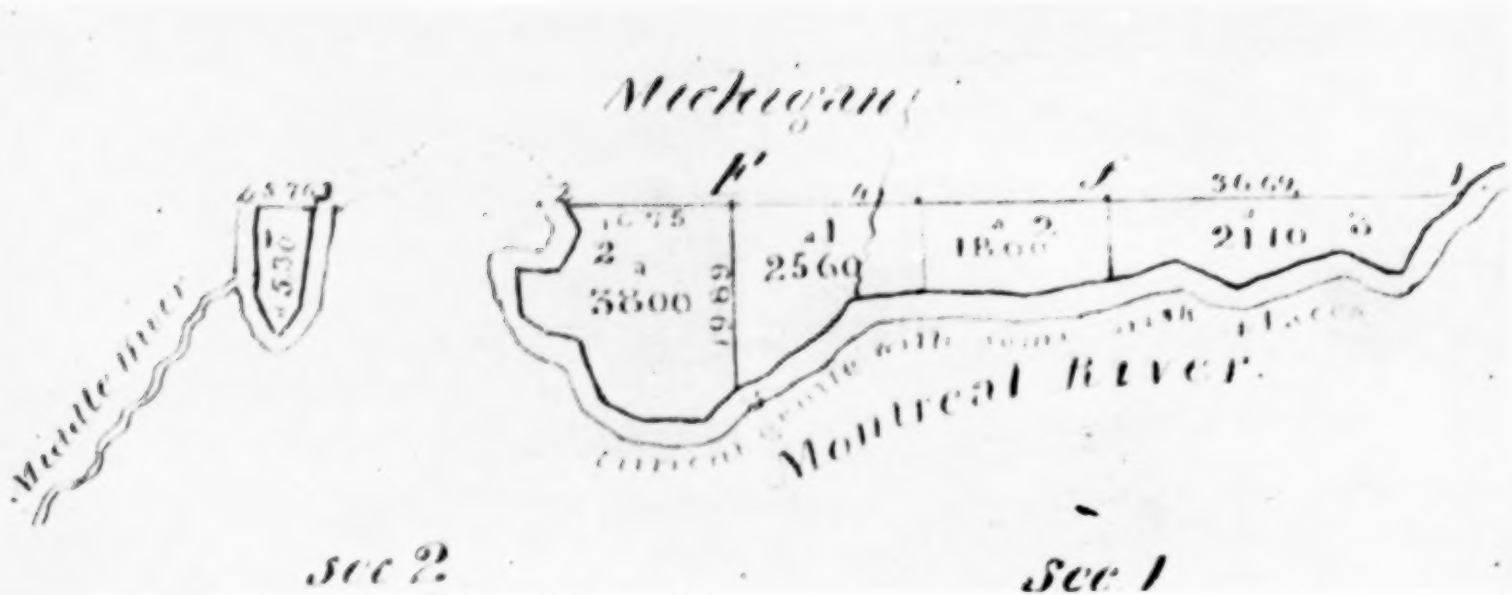
[79] R. P. 248-249.

in 1920. If, therefore, it be shown that the conditions on which they placed so much reliance in 1920, did not exist in 1836, or in 1848, and that the west branch joins the Montreal River at an angle so that to follow up the West Branch would make it necessary to depart from the natural or general course, then their entire theory falls. The evidence is undisputed that the west branch, in 1848 at least, came in at an angle, that it was called the Middle River then and that in the survey made then it was considered a smaller stream,[77] as appears from the maps on the opposite pages showing conditions in 1848 when the United States Government surveys were made and demonstrating beyond all doubt that the West Branch came in below the big bend referred to by the map produced by the Michigan engineers. (Plaintiff's Exhibit 171.) It also shows that the West Branch or Middle River, as it was then called, came in at nearly right angles to the general course of the Montreal River, which is shown to extend beyond this junction.

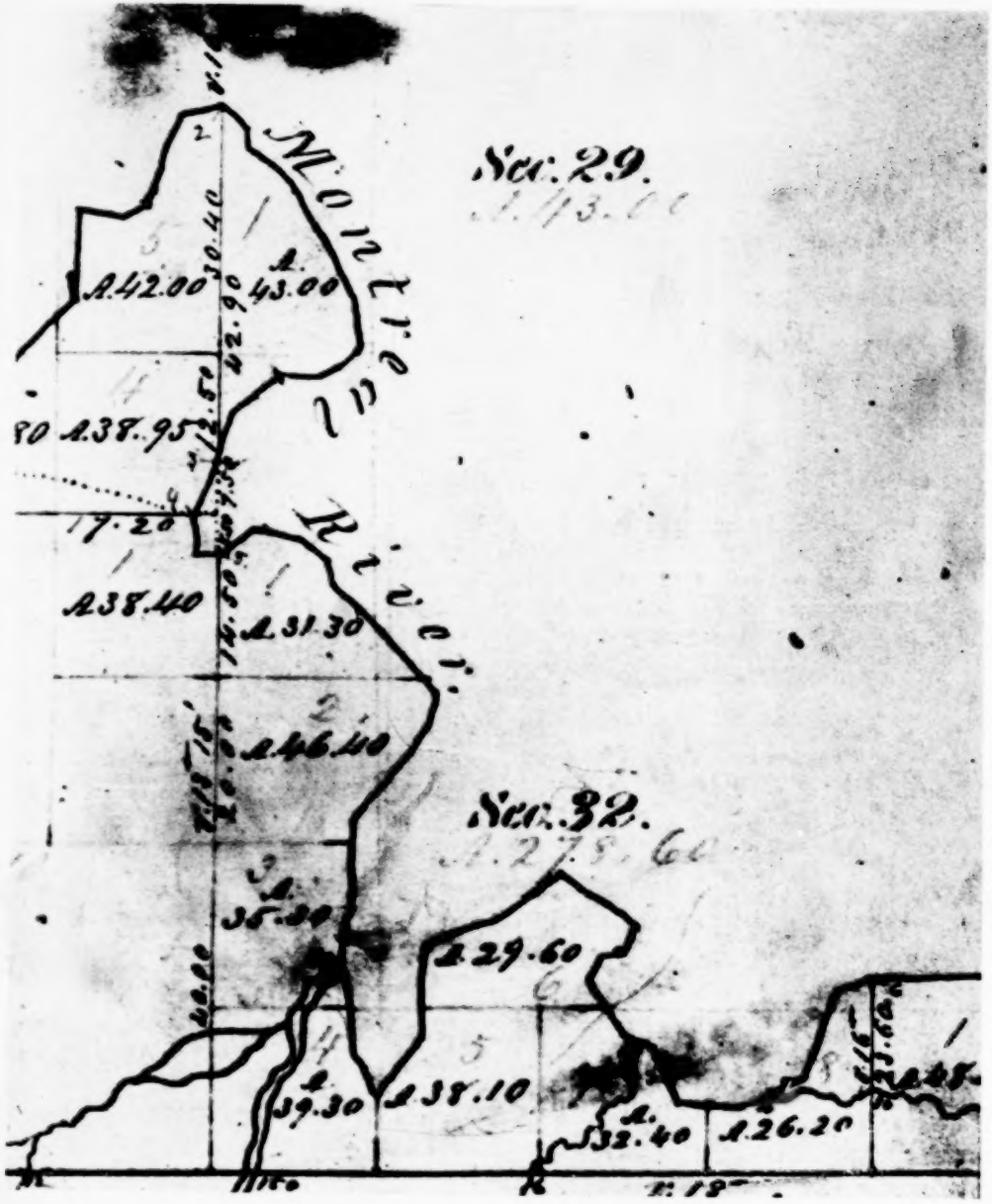
Similarly, the same condition is shown to exist in even greater detail by the Wisconsin survey of Town 47, Range 2 East of the fourth principal meridian on the Wisconsin side of the Montreal River. The river comes in at the same angle as in the Michigan survey and at about the same point. This map shows conditions in 1861 and 1862 when that survey was made.[78] Thus we find that the entire theory of the Michigan engineers falls, because the conditions which were controlling in forming their opinion as to which was the main stream, were not in existence in 1848 or 1861 and 1862.

The Michigan witnesses admitted that to do this, it would be necessary to drag the canoe through the water or to portage, and the testimony of Mr. Halbert was that dur-

[77] Wisconsin Exhibit 197, Sheet 3.
[78] Wisconsin Exhibit 109, Sheet 2.




Part of original plat of Township 47 North, Range 48 West, Public Surveys in Michigan, dated January 10, 1849. (Wisconsin Exhibit 197, Sheet 3).




Part of original plat of Township 47 North, Range 2 East, Public Surveys of Wisconsin, dated February 11, 1863. (Wisconsin Exhibit 109, Sheet 2).

ing normal level of water in the West Branch, water did not flow through this westerly channel and that there would have to be from 20 to 30 per cent more water flowing in the West Branch than there was on September 16, 1924, in order for the water to flow through the westerly channel, and a good deal more water than that for any considerable quantity of water to flow through that channel.[79] Thus if Michigan's theory were to be adopted the boundary would follow a channel during high water and a dry run during low water.

Another reason why the Michigan engineers considered the West Branch the main channel was that they discovered a log jam in the Montreal River immediately above the confluence. In spite of the fact that they claim that they had made an extensive study in this region, they had not discovered a more extensive log jam in the West Branch, only a short distance above the confluence of the two streams. This log jam was estimated to be older than the one in the Montreal River.[80] This but illustrates again the unreliability of the information gathered by the Michigan engineers and their conclusions and judgments upon such information.

Considering further that the channel of the Montreal River above the confluence is all the way from 35 to 100 feet wide, that it has few rapids, no obstructions above the log jam above the confluence and ranges from 6 inches to 2 feet or more in depth, while the West Branch of the Montreal River is narrower, has more rapids, more shoals and has a 500 foot log jam in it,[81] it becomes more apparent than ever that the judgment of the Michigan engineers, as to which is the main channel of these two streams, is entirely erroneous. The witness Hotchkiss after completin-

[79] R. p. 804, 248–249.
[80] R. p. 787.
[81] R. p. 787, 789.

a study of the two streams stated that there could be no doubt that the Montreal was the main stream.[3] Their judgment is also contrary to the judgment of Prof. Davis, an agent and representative of the State of Michigan, who examined these two streams in 1908, as appears from his report, Exhibit 380, which has heretofore been fully quoted and in which he states that the Montreal River presents a "wider, deeper and more river-like channel."[4]

In spite of the fact that the Michigan engineers, Burridge and Rupp, and fully concluded that the West Branch was the main channel of the Montreal River, the witness Macey, a water power expert from the state of New York, with extensive experience in matters of hydraulics and a study of water power problems, streams, etc., after laying down the principles upon which he would determine the main channel of a stream, concluded that from the evidence made available to him and after one week spent in the vicinity of the Montreal River, was unable to determine which was the largest of the two streams,[5] and this in spite

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[3] R. p. 587–588.

[4] Wisconsin Exhibit 380, p. 88.

[5] R. p. 983, 984.

"Q From your examinations and investigations here, what is your conclusion in regard to the relative size of these two streams?

A I have no opinion as to the relative sizes of the streams.

Q What is your conclusion of the efforts that have been made to measure them?

A I would state that in my opinion the available records indicate that the yield of the two water-sheds per square mile of their drainage areas, so far as they are known, are so nearly equal that it would require more careful and extensive measurements than have been made to ascertain which of them produces the greater run-off.

Q Considering the other characteristics of the two rivers, the characteristics which you mention as being and controlling the main channel, which of these two rivers would you say was the main channel of the Montreal River,—that is the

of the fact that he had exhibited to him the drainage area map of the two streams. He was unable to venture any opinion as to the size of the two streams because as he said he had not examined the entire water shed and the entire length of the two streams.[83]

When such refinement is required at a time when the entire course of the two rivers has been fully studied, minute and accurate gauging of their flow has been made, at two different points on each stream, accurate measurements made of additions and withdrawals from the respective rivers, in fact, every possible method of study and observation applied which would give some assistance and some indication of the relative sizes of these two streams, and in spite of all this, a man with national experience in questions of hydraulics, who has made extensive studies of water power and stream problems, cannot venture an opinion as to the relative sizes of the two streams, how can an honest claim be made that the work and judgment of a reputable engineer in the person of Captain Cram representing the United States and that of one of the foremost geologists of his time, Dr. Houghton, representing Michigan arrived at from a study of primeval conditions as they existed in 1841, should be upset nearly one hundred years after their investigations, to gratify the ambitions of an engineer, who in 1885 made, apparently, a casual observation of both streams, and from that concluded a mistake had been made.

The Wisconsin engineers also made a very extensive study of conditions at the confluence, from which they de-

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characteristic as to volume over entire distance, position in drainage area, etc?

* * *

A I am afraid I can't answer that question, because I have not examined all of those characteristics.

[83] R. p. 985.

termined that the part of the channel through which the waters of the Montreal River flowed was considerably deeper than that immediately west of it through which the waters of the West Branch flowed, and that that condition continued to the place where the waters join.[84] Moreover, that at the place where the waters of the two streams join, there was a deposit of gravel and rock which the engineers testified was a common phenomenon under circumstances where a weaker stream met a stronger stream, and was checked by the waters of the stronger stream sufficiently to permit the sediment in the weaker stream to be deposited, and that the rock and gravel found where the waters of the two streams join was deposited by the West Branch. This situation is clearly shown by Exhibits 124 and 124a, Exhibit 124 being a view down stream, with the West Branch in the immediate foreground, and Exhibit 124a being a view upstream, with the Montreal River in the foreground, extending from the bottom to the top of the picture, and the West Branch being to the right of the picture, as is also the deposit of rock, etc.[85]

The witness Hotchkiss, a geologist of very wide experience,[86] testified that the conditions shown by the aforesaid

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[84] Wisconsin Exhibits 120 and 120a.

[85] R. pp. 596, 538, 539.

[86] R. pp. 576, 577.

"Q What is your business Mr. Hotchkiss.

A I am a geologist.

Q Graduate of what?

A University of Wisconsin.

Q What year. A 1903.

Q And in what department?

A I graduated an engineer.

Q In what branch of engineering?

A It was a special course in engineering called 'General Engineer' for those who wished to go into mining engineering work.

Q And since that time will you give your experience and work you have been doing up to the present time?

pictures showed the West Branch to be weaker of the two streams, and confirmed his judgment that the Montreal River, as distinguished from the West Branch, was the main channel.[87] This conclusion of Hotchkiss was confirmed by the soundings taken by Mr. Halbert and Assistant Geologist Aldrich. These soundings are shown in Exhibit 120, and show that while in the immediate vicinity of the confluence the West Branch rarely exceeds ten inches in depth the Montreal River at the confluence and above the confluence is sometimes more than two feet deep.

Upon this record the defendant submits that not only has Michigan failed in her effort to establish that the West Branch is the larger stream, but that the record clearly shows that the Montreal River is the larger stream, and that the judgment of Prof. Davis, an employee of the State of Michigan, who examined both streams in 1908, was entirely correct when he stated that,

> "The east branch has a wider, deeper and more river-like channel. * * *These features mark the East Branch as a stream of much greater power than the West Branch. * * * Once at the junction of the branches, it is easy to see which branch is the main stream."[88]

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A I took too an advanced course later. I took the degree of Civil Engineering in 1908 and degree of Doctor of Philosophy in 1916 at the University. After graduating, my work was in connection with mining work in the Lake Superior iron districts for the first year about and the first two years, and in Northern Ontario. Then I was instructor in the University for three years and then I was employed by the Geological and Natural History Survey and have remained employed by them ever since. In 1908 I was made State Geologist, which position I now hold."

[87] R. pp. 584–587; Wisconsin Exhibit 122; Photos, D. E. F.

[88] Defendant's Exhibit 380, pp. 88–89.

**The Lake of the Desert referred to in the Michigan boundary description contained in the Michigan Statehood Act of 1836 is the lame lake as Lake Vieux Desert, located nearly midway between the commencement of the boundary on Lake Superior and the mouth of the Menominee River, and is not Island Lake claimed by the plaintiff in this case.**

MICHIGAN'S CLAIM AND BURDEN

The complaint alleges that Island Lake "was then (1836) known as *one* of the Lakes of the Desert,"[89] and the theory of the plaintiff is that the boundary line should have followed along with the West Branch of the Montreal River to Island Lake, and thence in a direct line to the south shore of Lake Brule, and the Lac Vieux Desert, which has been an important point in boundary ever since the first survey, should have been entirely eliminated. This claim is founded upon the theory that when the Michigan Statehood Act was passed, it directed that the boundary line should follow the main channel of the Montreal River to the Lake of the Desert, and that necessary compliance with that direction required the boundary line to end in a lake. Further, that Congress knew that the Montreal River did not rise in Lac Vieux Desert when it passed the Michigan Statehood Act. That proposition requires Michigan to show more than they have alleged in their complaint, that is, not only that the West Branch of the Montreal River was the river intended by Congress as the boundary, even though Congress said the Montreal River, but that Island Lake was *the* Lake of the Desert intended by Congress. They allege in their complaint, as above recited, that Island Lake was known as *one* of the Lakes of the Desert when the boundary line was first defined. They have failed to prove that allegation by any testimony whatsoever.

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[89] Complaint, p. 22.

**Lac Vieux Desert is an ancient geographical landmark and the name has always been applied to a definite lake.**

Lac Vieux Desert or the Lake of the Desert, as it is commonly referred to, is one of the oldest geographical points discussed by early historians and found on early maps. The John Mitchell map of 1775[90] shows the river and Lake of the Desert located in the same relative position that Lac Vieux Desert is actually located. One of the earliest of these maps found in the public archives of Canada at Ottawa was published in 1720, and locates "Lake of the Old Desert,"[91] substantially where Lac Vieux Desert is now located, and locates it as the source of a river following substantially the course of the present Chippewa River of Wisconsin.

In 1755 the Bellin map locates the lake in substantially the same location, but calls it Lac des Vieux Deserts.[92] The Huske map of 1755[93] locates the lake in practically the correct location, and calls it Lake of the Desert. The Nolin map of 1756[94] locates the lake in substantially the same location and calls it Lac des Vieux Deserts.

A map "of the five Great Lakes" published in 1760[95] again locates the lake in substantially the correct location and calls it Lake of the Desert. The Kitchin map of 1763[96] locates the lake correctly and calls it Desert Lake. The Bowen map of 1763[97] locates the lake and calls it Lac du Vieux Desert. The Arrowsmith map of 1795, with additions to 1811, again locates the lake, but does not name it. It shows, however, the Montreal River extending in the general direction of the unnamed

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[90] Plaintiff's Exhibit 1, part 2.
[91] Wisconsin Exhibit 116.
[92] Wisconsin Exhibit 115.
[93] Wisconsin Exhibit 118.
[94] Wisconsin Exhibit 113.
[95] Wisconsin Exhibit 119.
[96] Wisconsin Exhibit 117.
[97] Wisconsin Exhibit 114.

lake which is located on this map in practically the identical position that the Lake of the Desert in the maps above cited is located.

A map of the United States "exhibiting the seat of war on the Canadian frontier," published in 1816, shows a lake as the headwaters of the Menominee River which is called Menominee Lake, but which has the same relative location that the Lake of the Desert had in the other maps above cited.

The John Farmer map of 1829 locates the Lake of the Desert substantially correct, but shows it as the source of the Montreal River. The same is true of the Farmer maps of 1830 and 1836. The last two Farmer maps above referred to show, however, the West Branch of the Montreal River rising in a group of little lakes which are unnamed, showing that the Lake of the Desert throughout the period from 1720 to 1836 was never in any manner connected with the West Branch of the Montreal River, and that wherever reference was made to the Montreal River in connection with the Lake of the Desert, it was with what is now commonly called the East Branch, and that in such maps the West Branch was particularly distinguished and called a branch, while what is now called the East Branch was referred to as the main Montreal River.

According to Henry Colin Campbell, Menard, an early missionary and explorer, proceeded from Keweenaw Bay to Lac Vieux Desert by a trail, which is shown on numerous maps, which are exhibits in this case, and thence to the Black River,[98] showing again that Lac Vieux Desert has been a land mark in Wisconsin history ever since the earliest explorations into the interior.

In addition to what has been stated above, it is also important to consider that eminent historians also accepted the Lac Vieux Desert and Lake of the Desert as identical and as

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[98] Wisconsin Exhibit 2, Wisconsin in Three Centuries, Vol. 1, page 130.

referring to one specific, commonly accepted lake adopted by Captain Cram intended as one of the important points in the Michigan boundary.

Thus, George H. Cannon, upon whose conclusions the plaintiff relies in a large degree, was fully convinced that Lac Vieux Desert was an important point in the boundary.[99]

Reuben Gold Thwaites, a prominent historian, especially an authority concerning history in the central West, accepted the same theory.[100]

J. H. Colton, who published "The Western Portraiture and Emigrant's Guide", was also satisfied that when the Lake of the Desert was referred to Congress intended to designate Lac Vieux Desert.[1]

Likewise, in the Burr map of 1836 accompanying the Hon. Z. Casey's report concerning Indian lands in the western country, a group of five lakes is shown as Les Lac Vieux Desert. A sixth lake, considerably to the northwest of this group, is shown as the source of the Montreal River, but there is no indication from that map that this sixth lake was considered to be or intended to be a part of the group known as Les Lac Vieux Desert.[2] On the other hand, the Burr map of 1836 found in the Library of Congress has the Montreal River shown as rising in one of a group of five lakes located very similarly to the five lakes shown in the foregoing exhibit, but the group of lakes is not named as a group, and the name Lac du Vieux Desert is placed opposite the largest lake and the most northerly lake of the group. It is also to be noted that in this map a branch of the Montreal River heading in two lakes is located on the map in almost the correct position for the West Branch of the Montreal River, and that the stream heading in the group of lakes referred

[99] Plaintiff's Exhibit 62.
[100] Plaintiff's Exhibit 132.
[1] Plaintiff's Exhibit 60.
[2] Plaintiff's Exhibit 6.

to follows the general course or direction of the present Montreal River often referred to in these proceedings as the East Branch.[3]

The Augustus Mitchell map of 1846 shows a group of five lakes called thereon Lakes of the Desert with the Montreal River rising in the largest of these lakes. Again that river shows the course of the so-called East Branch of that river, and from the southwest of this river comes the West Branch and joins it at about the same angle as does the West Branch at the present time.[4]

The Charles De Silver map of 1856 shows again a group of five lakes called Lakes of the Desert, but has that branch of the Montreal River now referred to as the East Branch, and thereon called the Montreal River, rising in a small lake northwest from the group of lakes so named.[5]

In addition to these repeated proofs that the Lake of the Desert and Lac Viex Desert were accepted as defining the identical lake, and that this lake was located at a point far removed from the West Branch of the Montreal River, numerous exhibits have been produced, showing that the lakes located in the vicinity of the headwaters of the West Branch of the Montreal River have always been known as the Pine Wood Lakes. Thus, in the J. N. Nicollet map of 1843, the headwaters of the West Branch are shown to be in Pine Wood Lakes.[6]

In the A. B. Gray map of 1846 the Pine Wood Lakes are again shown as the headwaters of both the West Branch and of the Montreal River.[7] On the map accompanying the report of D. D. Owen of 1848, the sources of the "west fork" of the

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[3] Plaintiff's Exhibit 9.
[4] Plaintiff's Exhibit 43.
[5] Plaintiff's Exhibit 46.
[6] Wisconsin Exhibit 141.
[7] Wisconsin Exhibit 142.

Montreal River are shown as the Pine Wood Lakes.[8] In the Whittlesey map made in 1849 and accompanying the report of Irving and Van Hise, the Pine Wood Lakes are again shown as the sources of the West Branch.[9] On the map accompanying the report of John Pope of 1849, the Pine Wood Lakes are shown again as the sources of the West Branch.[10] The DeSilver map of 1857 shows the Pine Wood Lakes far removed from Lake Vieux Desert.[11] In the Farmer map of 1847, being a partial reproduction of the Bayfield map, Pine Wood Lakes again are shown as the sources of the West Branch of the Montreal River and far removed from Lac Vieux Desert.[12] In the Graesel map of 1852, the Pine Wood Lakes are also shown as the sources of the West Branch of the Montreal River.[13]

Thus, it will be observed not only that Michigan has failed to establish that the Lake of the Desert and Island Lake are identical, but it has been established by the uncontradicted proof in the record that Lac Vieux Desert was a distinct and specific lake, and as such, a historical and geographical land mark referred to in the boundary line definition, and that it was far removed from the headwaters of the West Branch of the Montreal River. Likewise, that the headwaters of the West Branch of the Montreal River at that time were known as the Pine Wood Lakes, so that neither by construction nor from the common understanding of men familiar with conditions in that region, can Michigan now claim that Island Lake, known in 1836 as one of the Pine Wood Lakes, was also considered to be one of the Lakes of the Desert. In addition to this graphic

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[8] Wisconsin Exhibit 144.
[9] Wisconsin Exhibit 145.
[10] Wisconsin Exhibit 146.
[11] Wisconsin Exhibit 147.
[12] Wisconsin Exhibit 148.
[13] Wisconsin Exhibit 149.

proof that Michigan's claim is not supported by any evidence whatsoever, we have the testimony of Lucius Lyon, who, as early as February 1, 1836, advised W. L. Newberry of Chicago, Illinois, that:

> "The bill for the organization of Wisconsin territory will undoubtedly become a law. It will embrace all the present territory of Michigan west of Lake Michigan and Green Bay and south and southwest of a line running up the Menominee River of Green Bay and through *old Desart Lake* down the Montreal River to Lake Superior."[14]

showing again that his conception of the term "Lac Vieux Desert" and "Lake of the Desert" were identical. He confirms this conclusion by his letter, under date of February 17, 1840, to Hon. H. D. Turner, when he refers to the boundary line as running up the Montreal River to *"Lac Vieux Desert"*, and mentions the fact that apparently Farmer's map was in error in showing that Lac Vieux Desert was the source of the Montreal River.[15] Likewise in his letter to Andrew Mack, Detroit, dated February 21, 1836, scarcely a month before the Michigan boundary was agreed upon he predicted Michigan's boundary in almost its exact language when he said:

> "To Col. Andrew Mack, Detroit, Feb. 21, 1836.
>
> I am sorry to have to inform you that the committee on the judiciary in the house of representatives will report on the boundary question in a few days against us and in favor of Ohio. I have very little doubt the report of the committee will be affirmed by both houses in opposition to everything we can do against it. Anticipating this, I have said to the committee, if they break up our southern boundary I for one shall go in for all the country we can get on Lake Superior and Michigan without producing serious inconvenience

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[14] Plaintiff's Exhibit 52.
[15] Wisconsin Exhibit 22.

to the inhabitants that may now or hereafter reside there; and I have no doubt the committee will recommend that our western boundary be so altered as to run down Lake Michigan to the Fox islands, thence along the main ship canal into Green Bay and up the Bay to the mouth of the Menominee river, thence up said river to the head of the branch nearest Lac Vieu Dessert, thence through said lake down the Montreal river to Lake Superior. I understand Messrs. Norvel and Crary are opposed to this addition and will try to prevent it, but it seems to me if we are to lose so much on the south we ought at least to have something on the west and north."[15a]

His letter to Charles C. Hascall of the same date is to the same effect. His use of the name Lac Vieux Desert and Old Desart Lake interchangeably for the same lake demonstrates the absolute fallacy of the Michigan theory.

More than this, Henry R. Schoolcraft's observations with reference to this region must also be disregarded in order for Michigan to prevail for he, in referring to the boundary line, considered Lake of the Desert and Lac Vieux Desert to be identical.[16] Schoolcraft was entirely familiar with this region, and to him Lac Vieux Desert meant but one lake, that is, the same lake that since has been known as Lac Vieux Desert. He relied not only upon his own information, but also upon that of a trader familiar with that country, and because of his familiarity with the country, he was as early as February 20, 1836 somewhat doubtful as to the possibility of running the boundary as described in the Michigan Statehood Act.[17] On August 5, 1836, he described to Hon. John Norvell,[18] United States Senator representing Michigan, the region lying east and north of the

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[15a] Wisconsin Exhibit 332, pp. 2–3.
[16] Plaintiff's Exhibit 40.
[17] Plaintiff's Exhibit 40.
[18] Plaintiff's Exhibit 41.

Michigan boundary line in the upper peninsula, and his account shows fully his general familiarity with that region. From the fact that Mr. Schoolcraft appeared before the congressional committee considering the boundary, it is hard to see how anyone can claim that the congressional committee had any different understanding of the situation than did either of these representatives of Michigan.

So far as it is possible, therefore, to obtain any authentic expression of the understanding of Congress or of any parties to the preparation of the boundary line description, but one conclusion can be drawn as to their understanding of what was meant by the term "Lake of the Desert", and that conclusion is that all of them understood exactly what every map and every authority familiar with the region in question understood, that is, that it meant Lac Vieux Desert and not some small and then unknown lake located 50 or 60 miles away from this land mark referred to in all the different maps above.

As late as 1907, when Michigan adopted her last constitution and was deliberately preparing for this suit, she again adopted the construction which had been accepted from 1836 to that date, that is that Lake of the Desert and Lac Vieux Desert were synonymous. The framers of that constitution did not conceive the theory now asserted in the complaint that "Island Lake was one of the Lakes of the Desert," but they provided that the boundary should run from Island Lake to the "Lake of the Desert" which is Lac Vieux Desert. By that action they reasserted the accepted interpretation of the boundary for the 71 year period from 2836 to 1907, that Lac Vieux Desert was the Lake of the Desert contemplated by Congress in the Michigan Statehood Act of 1836 and that it must remain one of the cardinal points in that boundary. Michigan, we confidently assert, has not only failed to establish her theory that Island Lake was one of the Lakes of the Desert, but her

actions as recently as 1907 belie the assertions made in her complaint.

Malhiot locates the Lake of the Desert as being east of Lac du Flambeau, and, therefore, makes it impossible to say that it had any connection whatsoever with Island Lake.[19]

James Duane Doty, in his account of northern Wisconsin in 1820, refers to Lac Vieux Desert and gives an elegant definition of the name as follows:

> "The Tenangon (Ontonagon) is ascended thirty-six miles, where a portage commences of two hundred pauses, to the 'old plantation' as commonly called, but by the French 'vieux desert', 'old deserted place,' which is on a small lake of the same name about four miles long, and three broad."[20]

This, of course, shows the origin of the name "Lake of the Desert". About the time of the passage of the Michigan Statehood Act, this name Lake of the Desert was frequently used in connection with Lac Vieux Desert.

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[19] Wisconsin Exhibit 3.
[20] Wisconsin Exhibit 4.

## GREEN BAY SECTION.

### Direct evidence of channel.

There are in the record two direct documentary statements that the Rock Island passage was the most usual ship channel in the '30s, which alone seemed to us to be sufficient to decide this phase of the case, being, as they are, wholly uncontradicted by any other direct evidence.

The first of these direct statements was made in the year 1832, four years before the date of the Michigan Enabling Act, by a considerable number of the best informed and most influential men of the shipping world of that day. We refer to the document which appears as Wisconsin Exhibit 367. This was a petition to the Senate and House of Representatives of the United States, signed by thirty of the leading commercial men of Detroit, and requesting the establishment of a light house on what is now known as Rock Island. Because of its importance, we quote the document in full, together with the accompanying letter of submission:

"House of Rep. Feby. 16, 1832

Col Newton—

Sir

I had the honor some time since to present a petition for the erection of a Light House at the entrance of Green Bay in the Territory of Michigan. I beg leave to say that most of the signers to that petition are Masters or owners of vessels upon the upper Lakes, men of good standing and good judgment and to add that from my own knowledge of that country, I believe the business of that country seriously demands it. The passage from the Lake (Michigan) into Green Bay is often difficult, particularly in stormy weather or in the night, and vessels are frequently obliged to lie by during the night time for want of a light.

Very respectfully

Your obt. Servt.

A. E. Wing

"To the Honorable the Senate and House of Representatives of the United States in Congress assembled.

The memorial of the undersigned, Merchants, and Masters and owners of vessels on the Northern Lakes, respectfully represents, that in the opinion of your memorialists, the interests of their commerce and navigation on these waters require the erection of a light house on 'Isle Pou' or 'Pottawattamie Island,' situated at the entrance of Green Bay in Lake Michigan. *The ship channel in entering the Bay is on the North side of this Island*[1] and is about one mile in breadth, the approach to which is rendered hazardous in dark nights in consequence of two extensive shoals, one situated at the Northward and the other to the Southward of the course leading to the mouth of the Bay from the Eastward. The South—shoal lies in a Easterly direction from the island, distant from three to five miles, and the other in a more Northerly direction, distant about two miles. These shoals are extensive and the water near them is bold. The warning of breakers' is therefore not given until a vessel may be too near to avoid them.

The track of vessels proceeding from the Straights of Michelimackinac to Green Bay lies through the passage between the 'Big Beaver' and the Fox Islands. From this point the course is West and by South to the mouth of the Bay, distant about forty five miles, and passes between these Shoals, leaving the Southerly one at the distance of two miles on the larboard and the northerly one at the distance of less than a mile on the Starboard hand. When the wind is adverse, or too close haul to enable her to keep her course good in making this traverse, the importance of the light contemplated by your memorialists will readily be seen. There is no point on the Northern Lakes, where in the opinion of your Memorialists, a light house is more imperiously required than at this. The Island is a high rocky Bluff at least Sixty feet above the surface of the Lake, where a tower forty feet in height would give the light a sufficient elevation.

Your Memorialists feel that the increasing commerce

[1] Italics ours.

of the Northern Lakes will justify them in an earnest appeal to the liberality of Congress for an appropriation for the object herein contemplated, and they pray that it may be granted.

Detroit Mich. Territory January 1832.

[Signed]

| | |
|---|---|
| Chesley Blake | John Palmer |
| Jacob A. Barker | Mason Palmer |
| R. Gillet | James H. Mister |
| D. G. Jones | I. W. Hollister |
| O. Newberry | N. H. Caswell |
| John Burtis | B. W. Miller |
| John A. Mucker | Lyman Stiles |
| Henry Whiting | Harvey Phelps |
| John Palmer | John Fleehartz |
| Mason Palmer | Richard Clement Jr |
| Antoine Dequindre | H. N. Holt |
| Andrew Mack | Richard Sears |
| Artemos Nosmer | John S. Kunbrichy |
| T. M. Chapin | G. Burke |
| Harry Whiting | F. W. Cait" |

The above petition shows pretty conclusively that in 1832 the Rock Island passage was the most usual ship channel into Green Bay.

The other direct statement to which we refer with particular emphasis is that found in Wisconsin Exhibit 54, which is an extract from the manuscript notes of Douglass Houghton. The exhibit bears date August 26, 1839, at which time Houghton was engaged, as State Geologist of Michigan, in making a geological survey of the territory adjacent to Green Bay.[2] Reference to his earlier notes shows that he proceeded westwardly and southwardly, along the north and west side of Green Bay, as far as the mouth of the Menominee River. From there he crossed to Chambers Island, and thence to the mainland of what is now Door County, along which he pro-

[2] For Houghton's qualifications and activities, see brief, pp. 55, 320–322.

ceeded northwardly until he crossed Death's Door and Washington Island, and came to Louse Island, or what is now Rock Island. In connection with the latter island, Dr. Houghton makes the following statement:[3]

> "Louse island, or as it is known to the natives, Monominee Isld. is an abruptly elevated island rising from 250 to 300 feet above the lake and bounded on almost all sides by abrupt precipitous cliffs of lime stone.
>
> *Between this island and St. Martins isd. is the principal Ship Channel to Green Bay,* the greatest depth being close along side of Louse Island where the average depth may be estimated at from 15 to 20 fathoms. Some portions of the Channel I am informed have a depth of 35 to 40 fathoms. The Channel drops off suddenly and abruptly from Louse Island.
>
> This Channel furnishes a good situation for fishing with gill nets, and white fish and trout may be taken here at almost all seasons of year excepting during the winter, at which time it is rendered exceedingly difficult in consequence of the Channel remaining open, or with large masses of ice floating through it."[4]

The Louse Island to which Dr. Houghton refers in the above note is the same island which we now know as Rock Island.[5]

It should also be recalled, in connection with Dr. Houghton's statement, that its author was at the time State Geologist of the State of Michigan and two years later became Michigan's commissioner to adjust the Wisconsin boundary.[6] We submit

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[3] Wisconsin Exhibit 54.

[4] Italics ours.

[5] See the testimony of Colonel Lawrence Martin, R. p. 712; and see also Michigan Exhibit 128, p. 33. That it could be no other island is clear from the reference to St. Martin's Island being on the other side of the channel. The maps show that St. Martin's Island is the next island north of Rock Island. William Betts, one of Michigan's witnesses, testified that when he first came to the Green Bay country, in 1855, Rock Island was popularly known as Louse Island. R. p. 40.

[6] See brief, pages 61, 70.

that it is difficult to conceive of more conclusive evidence of what was the most usual ship channel than the above quoted official scientific statement of Douglass Houghton.

The two documents above quoted show that the Rock Island passage was the most usual ship channel in 1832, and that it was the most usual ship channel in 1839. Can there be any doubt that the same situation prevailed in 1836?

The next bit of evidence to which we refer consists of the map attached to Captain Cram's second report, and marked "No. 6."[7] Captain Cram's first report appears in the record as Michigan Exhibit 15. On pages 8 and 9 of the report, Captain Cram discusses the question of the boundary in Green Bay, and concludes that the phrase "most usual ship channel" should be interpreted "best ship channel," and that a survey ought to be made to determine which channel is the best. His second report was made a year later, and appears as Michigan Exhibit 23. In this report nothing is said about the boundary in Green Bay.[8] On page 6 of the report, however, Captain Cram makes the following statement:[9]

> "IV. Lastly: The five maps, which, until now, have been separately considered, all combined by a proper connexion of the lines of the survey, form a general map, No. 6, so as to exhibit, on a scale of 20 miles to 1 inch, the whole route of the boundary, all the way through, from Green Bay of Lake Michigan to Lake Superior; also all the parts of Michigan and Wisconsin, which can possibly be supposed to have any bearing, either direct or indirect, upon the question of this boundary.
>
> This general map has been compiled with care, and it is presumed to have all the accuracy that can be desired for the immediate object in view"

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[7] Insert facing p. 163.

[8] Captain Cram states that the survey of the Green Bay channels remains to be completed, but says nothing more about the subject.

[9] Michigan Exhibit 23, p. 6.

Map accompanying Captain Cram's Second Report. (Michigan Exhibit 23).

Let us look, then, at this map which Captain Cram says is a complete map of the boundary. The material part of it is reproduced on the opposite page. It shows the western and northwestern shore of Green Bay north of the Menominee River, as a very light dotted line. The western shore of Lake Michigan, the eastern shore of Green Bay, and the western shore of Green Bay south of the Menominee, are shown by a heavy, unbroken line. Washington Island, Rock Island, Detroit Island and Plum Island are also shown in unbroken heavy lines. In short, these islands are exhibited by the same kind of line used to designate the mainland of Wisconsin in that vicinity, and by a different sort of line than that used to designate the mainland of Michigan. This shows that in Captain Cram's mind these islands were part of Wisconsin. The fact that his second report does not emphasize the necessity for a survey of Green Bay, which survey he so strongly urged in his earlier report, is evidence that he had made up his mind that a survey was not so urgently needed—that the islands were clearly on the Wisconsin side of the most usual ship channel.

We next refer to the report of Lieutenant J. G. Pendergrast to the Board of Navy Commissioners, dated August 18, 1837. Lieutenant Pendergrast had just made a survey of the Great Lakes, to determine where light houses were most needed. In his report, he says:[10]

> "*Entrance of Green bay.*—The mouth of this bay is about thirty miles in width, and thickly studded with islands. There are two principal passages, about twenty-five miles apart. In the northern or Louse Island passage there is a light-house about going into operation, and will, doubtless, be of great advantage to vessels coming from or going to Mackinac. The south or Port de Mort passage is used by those who are bound to or from the upper part of Lake Michigan. This passage is without

[10] Wisconsin Exhibit 52, pp. 9–10.

> a light, and I beg leave strongly to recommend that one be placed there as soon as convenient. It should be a colored light, to distinguish it from the one in the northern passage"

It thus appears that as early as 1837 there existed the condition which we shall discuss in some detail later, to wit,—that the channel used by vessels depended largely upon the destination of those vessels, ships traveling between Green Bay and Mackinac or the lower lakes using the north or Rock Island passage, and those plying between Green Bay and southern Lake Michigan ports, such as Chicago, using the south channel, Death's Door. We shall later show that in 1836 and prior thereto much more shipping went from Green Bay to Mackinac than from Green Bay to southern Lake Michigan ports, and that accordingly the Rock Island passage was the most usual channel.

Another piece of very important direct evidence of the channel is the John Farmer Map of 1830.[11] This map was explained by the witness Lawrence Martin.[12] A glance at it will show that a dotted line runs in a southwesterly direction from the middle of the northern part of Lake Michigan just south of Big Beaver Island, into Green Bay, passing just north of the island designated "I Pou." This line is designated "Ship Chan," and is obviously meant to represent the ship channel. The island which is referred to on the map as "Pou Island" is what is now known as Washington Island.[13]

Attention will doubtless be called to the fact that there are other dotted lines appearing on this map, and that one of them passes south of Pou Island, through Death's Door. Those lines, however, are not designated to be ship channels, but on

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[11] This map appears in the record as Michigan Exhibit 5 and Wisconsin Exhibit 162a. A portion of it is enlarged in Wisconsin Exhibit 162, and printed in the supplement Figure 20.

[12] R. pp. 692, 743.

[13] See the testimony of Lawrence Martin, R. pp. 692, 706.

the contrary represent the paths taken by individual travelers. This fact appears from the legend or explanation in the right hand corner of the map.[14]

In connection with this map, Colonel Martin testified as follows:[15]

> "MR. RIESER: I also call your attention to Plaintiff's Exhibit '5' and in the vicinity of the mouth of Green Bay, and ask you whether or not there is any ship channel indicated there?
>
> A. Plaintiff's Exhibit '5' is John Farmer's 'Map of the Territory of Michigan and Ouisconsin', dated 1830; it shows a dotted line running from the middle of Lake Michigan just south of Big Beaver Island in a southwesterly direction into Green Bay. The line is designated 'Ship Channel' and enters Green Bay just north of an island designated 'I. Pou.'
>
> Q. Now from your examination of the maps that are in evidence in this case, can you say by what name that island is known now?
>
> A. The island of 'Pou' is known as 'Washington Island.'"
>
> * * *
>
> "A. The lines alluded to as shown on Plaintiff's Exhibit 5, and the legend near the upper right hand corner of the map represent 'Schoolcraft's Route'. The fact is indicated further by the designation along the same line in the southeastern part of Lake Michigan—'Schoolcraft's Route in 1820'; and it is still further indicated that that dotted line should not be confused with the dotted line marked 'Ship-Chan,' which enters Green Bay north of Pou Island, from the fact that the line marked 'Schoolcraft's Route' gives the dates August 27, September 5, 6, 7, and several other dates, showing that it is the route of Schoolcraft in the year 1820."

It thus appears from a map put in evidence by both Michigan and Wisconsin that in 1830 John Farmer, who was an

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[14] Michigan Exhibit 5; Wisconsin Exhibit 162a.
[15] R. pp. 692, 743.

experienced and prolific map maker, found but one ship channel into Green Bay which was worthy of designation on his map, and that that channel was the one which we now call the Rock Island Channel, and which Wisconsin claims to be the boundary.

Bearing out the conclusion which is inescapable from the statements and map to which we have already referred is the John Farmer map of 1853.[16] This map shows Rock Island, which it denominates "Louse I," and indicates the light house on that island. Touching the island, and extending clear across the map towards it from the northeast, is a black line, on which is written "To Green Bay W 3/4 S." This line is obviously a sailing course and is the only one which appears in the Green Bay region, thus showing that the maker of the map considered the Rock Island passage to be the only channel into Green Bay of enough importance to be designated on the map. The map is dated 1853, and we do not refer to it as in any way conclusive evidence of the channel in 1836. We notice it simply because it tends to corroborate the earlier and much more conclusive evidence.

For the same purpose, we call the court's attention to Disturnell's Map of 1865.[17] Disturnell, like Farmer, was a prolific publisher of maps, which he attached to his various pamphlets and travelers' guides. The map in question purports to show steamship routes, and it will be seen that it designates but one such route leading into Green Bay, and that one goes through the Rock Island channel. No ship passage is indicated through Death's Door. This is evidence that even as late as 1865 there was not enough travel through the southern passage to cause a maker of standard maps to indicate a channel there.

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[16] Wisconsin Exhibit 172. A part of this map is reproduced in the supplement to this brief as Figure 25.

[17] Wisconsin Exhibit 166. A part of this exhibit is reproduced in the supplement as Figure 22.

## Character of the Channels

We have just set forth several items of direct evidence as to which channel was the most usual one in 1836. We now call the court's attention to the physical characteristics of the two channels, with the purpose of demonstrating that the Rock Island passage is a relatively wide, safe, and easy channel, while Death's Door is narrow, rocky, and exceedingly dangerous. These characteristics give rise to a clear inference that the most usual ship channel, at a time when light houses, buoys, bells and even accurate charts were unknown in the region, must have been the Rock Island passage,—the wider and infinitely better of the two.

To show how impossible it is to consider any channel but the Rock Island passage the *main* channel into Green Bay, we have printed in the supplement a profile of the Grand Traverse, from the northernmost tip of Door County to Summer Island. It is based on the large chart which appears in the record as Michigan Exhibit 114. A small scale photograph of the chart is also printed in the supplement as Figure 30, and the line along which the profile is taken is indicated in heavy black. The Court will observe that the line runs from the end of the Door County peninsula to Plum Island, Detroit Island, Washington Island, Rock Island, St. Martin's Shoal, St. Martin's Island, Gull Island, Poverty Island and Summer Island. Care has been taken to insure that the line crosses the various channels at places of representative width. The distance in miles from the starting point on the Door County Peninsula is indicated by the figures along the horizontal line in the middle of the profile, which line represents the level of the water in the lake. The vertical heights and depths as obtained from the soundings and contour lines upon the chart are indicated in feet at the left hand edge of the profile, being greatly exaggerated in relation to horizontal distance. The exaggeration is plainly indicated by

the fact that the small square unit which represents one-half mile horizontally represents only twenty feet vertically.

A glance at the profile will show beyond cavil that the Rock Island passage is the only one of the channels which can conceivably be called the main channel. The profile clearly shows this, and no argument is necessary to supplement it.

Colonel Lawrence Martin, an internationally known geographical expert,[18] testified as follows concerning the width of the two channels:[19]

> "Q. Calling your attention now to Wisconsin Exhibit 201, I would like to have you give me the distance from the northernmost point of Door County, mainland of Wisconsin, to the southernmost point of the southernmost island in Death's Door?
>
> A. About a *mile and a half*.
>
> Q. From the northernmost point of Rock Island to the southernmost point of St. Martin's Island Shoal, what is the distance?
>
> A. Measuring that distance on Plaintiff's Exhibit 114, the distance from Rock Island to St. Martin's Shoal is *two miles and three-eighths*.
>
> Q. In reference to Exhibit 114, I have referred to a map of the entrance to Green Bay, Lake Michigan, first submitted as Exhibit 114. Will you also give us the distance from the upper end of the Door County Peninsula to the nearest point from that point on Plum Island?
>
> A A distance of a *mile and three-eighths*"[20]

It will be noted that Colonel Martin gives the distance between Rock Island and St. Martin's Shoal. He later testified as follows:[21]

> "A The name St. Martin's Island shoals apply to two different shoals as indicated on the map. The vessel of a

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[18] Now Chief of Map Division, Library of Congress.
[19] R. pp. 658–659.
[20] Italics ours.
[21] R. p. 742.

light draft would clear the south part of the easternmost of those shoals where a depth of 16 feet is shown; it could clear the middle or south part of the westernmost of those shoals where a depth of 15 feet is shown"

Thus it appears that the light draft vessels in use prior to 1836 would have a much wider channel than the two and three-eighths miles between Rock Island and St. Martin's Shoal.[22] A glance at any accurate map will show that when St. Martin's Shoal is disregarded the Rock Island passage is about three times as wide as Death's Door.

The width of the channels is especially important when it is considered that the vessels in use prior to 1836 were principally sailing vessels, as we shall show hereinafter. Steamships were a great rarity at that time. It is well known that a sailing vessel which is trying to make headway against an adverse wind must resort to "tacking," that is, it must zigzag its way, and this requires a very wide path. Is it likely that the navigators of sailing vessels would chose the narrow Death's Door when they could as well take the broad and spacious Rock Island passage?

Death's Door is not only narrow but it has very strong currents and dangerous rocks and shoals. The Rock Island passage is not thus afflicted. To prove this point, we shall quote from several official navigation guides.

In Michigan Exhibit 118, consisting of extracts from official sailing directions published by the Department of the Navy in 1906, appear the following statements:

"PORTE des MORTS (DEATH'S DOOR) PASSAGE.—The southerly entrance into Green Bay, known as 'Death's Door.'

[22] As late as the '50s a vessel drawing nine feet of water was considered to be a good sized vessel (R. pp. 107–108). For statistics on the size of vessels in use in the '30s, see Wisconsin Exhibit 90, p. 3, where it appears that the average tonnage of 61 steamers on the Great Lakes between 1837 and 1840 was 300 tons, and that of 225 sailing vessels about 80 tons.

> There is a strong current setting in or out according to the direction of the wind, and many vessels have been lost in consquence; it is frequently so strong that sailing vessels cannot make headway against it. The coast is rock bound and certain destruction awaits the craft going ashore. Sometimes the current is against the wind"[23]
>
> "ROCK ISLAND PASSAGE lies between Rock Island and Nine-foot Shoal buoy 2½ miles NE. from Rock island. By favoring the Rock island side of the passage *all dangers are avoided.*"[24]

We next refer to Wisconsin Exhibit 58, consisting of extracts from The Great Lakes Pilot for 1921:

> "PORTE DES MORTES (DEATH'S DOOR) PASSAGE.—The southerly entrance into Green Bay, known as Death's Door.
>
> "There is a strong current setting in our out, according to the direction of the wind, and many vessels have been lost in consequence; it is frequently so strong that sailing vessels can not make headway against it. The coast is rock-bound, and certain destruction awaits the craft going ashore. Sometimes the current is against the wind"[25]

No dangers are mentioned in connection with the Rock Island passage, which is described on the fourth page of the exhibit.

The following statements are found in Bulletin No. 33 of the U. S. Lake Survey Office, dated April, 1924:[26]

> "THE OUTLET OF GREEN BAY between the two mainland peninsulas is approximately 28 miles wide, but the waterway is so choked with island and submerged reefs and shoals that the channels through

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[23] Michigan Exhibit 118, p. 2.
[24] Michigan Exhibit 118, p. 6. Italics ours.
[25] Wisconsin Exhibit 58, p. 1.
[26] Wisconsin Exhibit 330.

them have acquired the reputation of being dangerous, though the Rock Island Passage northerly of Washington Island is 2 miles wide between the 10-fathom curves. The four principal entrances are the Poverty Island Passage and the St. Martin Island Passage at the northerly approach, the Rock Island (*or main*) Passage to the north of Washington Island, and the Porte des Morts Passage at the southerly approach, commonly known as 'Death's Door'. A description of these channels follows"[27]

"Rock Island, Wis., is located 4½ miles SSW. of St. Martin Island and just off the northeast corner of Washington Island, with which it is connected by a shallow bank. The west, north and east sides of the island are steep-to. On the northwest point of the island is Pottawatomie Light, fixed white, visible 18 miles, serving as a guide to the Rock Island Passage between St. Martin and Rock Island. The usual passage is between Rock Island and the red gas and nun buoys, and unless familiar with the locality vessels should not pass to the northward of the buoys"[28]

"PORTE DES MORTS PASSAGE, WIS., is the southerly entrance to Green Bay having Plum and Pilot Islands on its northeasterly side and the south mainland peninsular opposite. It is known as 'Death's Door,' owing to the numerous detached reefs and shoals obstructing its navigation, and the strong currents setting in or out according to the direction of the wind. The coast is rock-bound and is almost certain destruction to craft going ashore. These conditions have been the cause of many vessel disasters"[29]

Turning now from scientific publications to general history, we find the following statements in Hjalmar Holand's History of Door County, Wisconsin:

"* * the sea captains, traveling in these waters with their cargoes of forest products, learned to re-

[27] Wisconsin Exhibit 330, p. 1.
[28] Wisconsin Exhibit 330, p. 3.
[29] Wisconsin Exhibit 330, p. 4.

spect the sudden gales on Green Bay, the treacherous squalls in the Door and the big storms of Lake Michigan. The passage through the Door was particularly dreaded. To lose a deckload in making the passage was so ordinary an event as not to be worthy of mention. * * * In the fall of 1872 he reports eight large vessels stranded or shipwrecked in the Door in one week. The preceding year, 1871, almost one hundred vessels were lost or seriously damaged in passing through the door * *"[30]

"The Pilot Island lighthouse is famous for having witnessed more shipwrecks than any other lighthouse on the Great Lakes. If their number could be told it would be a legion. On this little crag and its nearby rocks and shoals scores of proud vessels have been irresistibly driven to be quickly pounded to pieces by the thundering seas. Many times the crew of the lighthouse have been called upon at the risk of their lives to save the imperiled crews"[31]

* * * * *

"When the early French explorers found their way to the upper lakes it was not long before they discovered that the door or passage leading from Lake Michigan to Green Bay at the extremity of the Door County Peninsula was an extremely dangerous passage. They therefore called it Porte des Morts — the Door of Death. Here strong currents and fierce winds were often suddenly encountered which capsized their crafts or drove them irresistibly on to the rock-bound shores. Here according to tradition, La Salle's Griffin, the first sail vessel to ply the great lakes, was wrecked about 1680 and here since then hundreds of proud vessels have met their doom. One week in September, 1872, no less than eight large vessels were stranded or wrecked in 'the Door.' In the summer of 1871 almost a hundred vessels suffered shipwreck here.

"Just as turbulent as these straits are in summer just

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[30] Michigan Exhibit 128, p. 28.

[31] Michigan Exhibit 128, pp. 30–31.

as treacherous are they in winter. The ice forms late and disappears early. At no time is it absolutely safe. Owing to strong currents brought on by shifting winds the ice quickly breaks up. Where the ice may be several feet thick in the morning the waves may wash in the evening.

Many stories could be told of terrible adventures in crossing this treacherous bridge of ice"[32]

It is apparent from the above uncontradicted evidence that Death's Door is a very difficult and dangerous passage, and has been so in the past. There is no evidence whatsoever in the record that the Rock Island passage is subject to these peculiar dangers to a material degree.

Further light on the character of the channels may be obtained from certain testimony introduced on behalf of the state of Michigan. Martin Knudsen, who came to Washington Island in 1866 and has lived there since that time, and whose experience gives him a knowledge of matters of navigation in that vicinity, testified as follows:[33]

"* * With the wind northwest it was practically impossible for any vessel to beat through that Door; it can't be done in a storm.

Q Through Death's Door?

A No. They would go around then through the other passage, because there they have plenty of room.

Q And when you say 'the other passage,' that is Rock Island?

A Yes sir.

* * *

Q And a northwest wind when you have storms is quite common, isn't it, when you have bad storms?

A Oh, yes, you have them quite frequently"

We may close this branch of the discussion with a reference to the testimony of a Michigan witness, Captain

[32] Wisconsin Exhibit 100, p. 3.

[33] R. p. 61.

Frank D. Root, a navigator of long experience, who picturesquely testified that a man would be a damn fool if he tried to run a ship through Death's Door at night, before the light house was there.[34] As will appear hereafter, no lighthouse was placed in Death's Door until many years after 1836.[35]

**Course Taken by Early Travelers**

We have heretofore set forth some direct evidence that the Rock Island Channel was the most usual channel in 1836, and we have further shown that it is, and of necessity always has been, the much better and safer channel. We now advert to still another class of evidence leading, we believe, to the conclusion that in and prior to 1836 most of the traffic preferred the Rock Island passage to Death's Door. This evidence consists of proof that a large number of individual travelers prior to 1836 actually passed through the Rock Island Channel in going into or out of Green Bay. There is no evidence in the record that any considerable number of travelers went through Death's Door and we have been unable to find any such evidence. In this situation, we feel that the evidence which we have offered as to actual use of the Rock Island passage is strongly inferential of the fact that that passage was the most usual one in the early days.

The first travelers to whom we refer in this connection were the officers and men of the United States Army who voyaged from Mackinac to Fort Howard (now city of Green Bay), in 1816. We quote the following from a historical account of this excursion.[36]

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[34] R. p. 75.

[35] The first lighthouse in Death's Door was established in 1848. See brief, pp. 182–183.

[36] Deborah B. Martin's History of Brown County (Michigan Exhibit 57, pp. 3–4.)

"With the idea that resistance might be expected from the Indians, Colonel John Miller, commandant at Mackinac, ordered two companies of infantry and a detachment of artillery from that post to cover the landing and aid in securing the encampment of the troops destined to garrison in Green Bay. Miller undertook the command of the expedition in person and early in July, 1816, orders to embark were received.

The fleet consisting of three schooners, the 'Washington,' 'Wayne,' 'Mink,' and a sloop, the 'Amelia', sailed from Mackinac on the twenty-sixth of July. There were on board, Colonel Miller of the third regiment, Colonel Chambers of the Rifles, Major Gratiot of the Engineers, a detachment of artillery under Captain Pierce, and four companies of the third infantry, amounting in all to five hundred men. On the twenty-ninth of the month the transports with the whole command were lying off the mouth of Green Bay at anchor, light and contrary winds having delayed their passage. The Washington, which carried the officers, put into the sheltered harbor of a large, well-wooded island just at the entrance of the bay. Not knowing that they were treading on the ancient camping ground of the Pottawatomies the American officers christened the island 'Washington' in commemoration of their flagship as well as the Father of his country.

As the fleet sailed up the bay another large island was sighted and to this they gave the name of the new commandant appointed to the Green Bay post, Colonel Talbot Chambers.

Augustin Grignon, who chanced to be in Mackinac when the troops set sail, was pressed into the service of pilot on the Washington, the bay being an unknown and treacherous course to the American navigators, and on either the seventh or eighth of August, contemporaries differing as to the day, the convoy entered the south of Fox river"

See also Holand's account of the same voyage.[37]

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[37] Wisconsin Exhibit 100, p. 1.

A map showing the course taken by the army expedition appears as Wisconsin Exhibit 167. On this exhibit Washington Island can easily be distinguished under the name of "Miller's Island." Washington Harbor, on the north side of Washington Island, is designated by that name. On the map are dotted lines indicating the path followed by the "George Washington" and the "Mink,"—two of the vessels of the expedition. It will be noticed that both of these vessels took the passage north of Washington Island. The "George Washington" stopped for four days in Washington Harbor.[38]

It is especially important to note that Augustin Grignon was pilot on the George Washington, and that Chappue, or Chappeau, was pilot on one of the other vessels.[39] These men were old settlers of the Green Bay region and were impressed into service as pilots because of their familiarity with the local geography. Chappue had lived on the shores of Green Bay since 1796 or 1800, and was acting as a trader.[40] Augustin Grignon was also an old settler and an active trader, a fact which can readily be verified by a reading of any history of the Green Bay region, although it does not seem to be expressly in evidence.[41]

We submit that it requires no argument to demonstrate the significance of the fact that in 1816 a United States Army expedition piloted by persons well versed in local geography chose Rock Island passage in preference to Death's Door. Such an expedition under such guides would not be likely to pick an unfrequented or unusual channel.

The next traveler to whom we direct the Court's attention was General A. G. Ellis, who came to Green Bay from the East

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[38] Wisconsin Exhibit 100, p. 1.

[39] See above quoted extract from Michigan Exhibit 57, and also Wisconsin Exhibit 331.

[40] See Michigan Exhibit 134, p. 1, and Wisconsin Exhibit 79, pp. 1–2.

[41] See, for instance, Miss Martin's History of Brown County.

about the year 1821. The following extract from his "Recollections," shows quite plainly that the ship upon which he was a passenger entered Green Bay through the Rock Island passage:

> " * * Leaving Mackinaw at daylight, with a fine breeze, we got to the mouth of the bay, just before dark; the wind was westerly, and by the time increased almost to a gale; it drew directly out of the entrance. The captain attempted to beat in past Washington Island; the vessel worked heavily, missed stays and fell off. The effort was repeated two or three times, without success, and finally given up, and the vessel was put away before the wind; darkness came on, and the wind rose to a severe gale[42]
>
> * * * The gale blew out at last, when we gladly reembarked, recrossed Lake Michigan to Washington, otherwise Louse Island, and this time entering Green Bay without difficulty, found ourselves the next morning in Fox River, opposite Fort Howard"

Wisconsin Exhibit 50 consists of extracts from the Journal of Jackson Kemper, an Episcopalian missionary who later became bishop of the church. In the journal for the year 1834 we find the following passages:[43]

> "When I rose this morning we were entering Green Bay. Louse or Potowatamie Island (The Ps called Lice by the french on account of their dirty habits) on our left—Bower's (Bowyer's) bluff ahead & Green island just passed on our right. * *
>
> 5 Aug tuesday 11 oc a. m. I am now in Lake Michigan on board the Sheldon Thompson steam boat on my way home. God be praised. * * * 5. My berth proved a sad one—bed bugs &c & very rocking—slept very little. Rose at day break when the boat started. Many passengers complain of dirt & vermin on the boat. Passed the beautiful eagle harbour—grape islands. Death's door

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[42] Wisconsin Exhibit 4, p. 3.
[43] Wisconsin Exhibit 50, p. 1.

> the N; part of the Peninsula between L Mich & Green Bay, Bouers (Bowyer's) bluffs a most splendid display of natural fortifications—high perpendicular wall, angles & apparently port holes. When at Potawatomie or Louse island the Capt took the Collector ashore to fix upon a scite for a light house the Government has ordered to be built * *"

The fact that Kemper passed Louse Island on the left, in entering Green Bay, and passed Bowyer's Bluff, in leaving the Bay, makes it clear that he passed through the Rock Island Channel on each occasion.

Plaintiff's Exhibit 85 is a map copyrighted in 1832 and bearing upon its eastern border a table of names and destinations under the designation "steam-boat routes." Under the further heading "Detroit to Fort Howard" it bears the names "Mackinaw," "Great Beaver Id," "Isd. Brule," "Chambers Id.," "Green Id." and "Fort Howard." This shows it was customary for steamships in that day to pass by and perhaps stop at Brule Island. The witness Martin testified that it is clear that this map is intended to indicate that the island designated as "Isd. Brule" is north of what we now know as Rock Island and Washington Island.[44]

The map and the table accompanying it show, of course, that the steam boats of that day customarily passed north of Rock Island and hence could not have used Death's Door.

Another evidence that the mariners of the day were accustomed to pass by Rock Island is found in the report of Lieutenant James T. Homans to the Secretary of the Treasury, dated November 5, 1838. Homans had been sent by the government to "survey and examine the northern lake boundary, west of Detroit, under the provisions of the act of Congress, approved 7th July last, respecting light-houses." In the course of his report, Homans says:

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[44] R. p. 706.

"The light on Pottawatomie island, near the entrance to Green bay, the last in my route of those in operation, I was unable to examine, either in passing in or out of the bay, for reasons before stated. The island is high, and only accessible on one side, which was exposed to the gales prevailing while I was there. I satisfied myself, as well as I could, by inquiry of masters of vessels and others, that this light was in good order, and carefully attended"[45]

It will be noticed that although Homans could not himself inspect the light house, he obtained the desired information from masters of vessels. This shows plainly that masters of vessels passed north of Rock Island, for if they had gone through Death's Door they would have been unable to see the light and would have known nothing about it.

It appears from Mr. Holand's History of Door County, Wisconsin, that Rock Island was well known as a landmark to early explorers, that it was the first place in Wisconsin visited by white men, and that the first settlers in what is now known as Door County located on Rock Island about the year 1835 or 1836, a considerable settlement being established at that time.[46] The fact that this tiny island attracted so much attention is strongly inferential of the fact that the most usual ship channel brought travelers directly by it.

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[45] This extract does not appear in the record but is taken from an official publication of which the court may take judicial notice, viz., the volume entitled "Compilation of Public Documents and Extracts from Reports and Papers Relating to Light-Houses, Light-Vessels, and Illuminating Apparatus, and to Beacons, Buoys and Fog Signals. 1789 to 1871," p. 247. It appears earlier in the report that the reason why Homans did not inspect the light was that a severe gale was in progress, making it unsafe to land upon the rocky shore of the island.

[46] Michigan Exhibit 128, pp. 33–36.

## Lighthouses

The next class of evidence bearing upon the early custom relative to the use of channels is that concerned with the lighthouses erected by the United States government. We are able to show that a lighthouse was placed on Rock Island in the year 1836, while none was built in or near Death's Door until 1848. We shall further show that the location of the lighthouses was no mere chance disposition, but was made after careful study of the traffic conditions, and the lights were placed where they would benefit the most travelers. We contend that the fact that the first lighthouse was placed on Rock Island instead of in Death's Door shows that the Rock Island passage was at that time the most usual channel. This is especially true when it is remembered that, as we have shown above, Death's Door is a much more dangerous channel, and if used as much as Rock Island passage, would much more likely have received the first lighthouse.

As above stated, the Rock Island light was established in 1836, the very year in which the Michigan boundary was described. The following historical statement is quoted from Holand's History of Door County, Wisconsin:[47]

> "In order to minimize the dangers in passing along the dangerous shore of Door County the U. S. Government has from time to time erected lighthouses at various points. There are now seventeen of these beacons besides several bell and gas buoys to guide the mariner to safety.
>
> The first to be erected was the 'Pottawatomie Light' which was erected on the northwesterly point of Rock Island in 1836 and taken in use in spring of 1837. It is the first lighthouse to be erected west of the great lakes. It is also the highest lighthouse on all the inland lakes, its lantern being 137 feet above the sea level. Its light can be seen for twenty miles * * *"

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[47] Wisconsin Exhibit 100, p. 1.

In 1834 an appropriation of $5,000 was made by Congress for the establishment of the Rock Island light; in 1836 $3,000 more was appropriated; and in 1837 still another $5,000 was added.[48]

That the Rock Island light was already in place and in operation in 1837 appears from the letter of Chesley Blake and the report of Lieutenant Pendergrast, which appear in the record.[49]

That the Rock Island light was placed on that island because it was most needed there is shown by the Memorial of the Detroit Merchants and Masters, which we have quoted above, under the heading "Direct Evidence,"[50]. It will be recalled that the Merchants and Masters petitioned Congress in the year 1832 for the establishment of a light house on "Isle Pou" or Pottawattamie Island, at the entrance of Green Bay, and stated that:

> "There is no point on the Northern Lakes, where in the opinion of your Memorialists, a light house is more imperiously required than at this."[51]

There can be little doubt that the petition was instrumental in procuring the establishment of the light,[52] and the men who

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[48] Wisconsin Exhibit 51.

[49] Wisconsin Exhibit 52, pp. 7, 10.

[50] Brief pp. 158–160.

[51] Wisconsin Exhibit 367.

[52] The letter submitting the Memorial was addressed to Colonel Thomas Newton, who was a member of the House Committee on Commerce, and the petition itself was referred to that committee Later in the same year (1832) Colonel Newton introduced a bill providing for the establishment of a lighthouse on Pottawattamie Island. This bill, House Bill 567, failed to pass that session, but is important as tying the Memorial to the Committee on Commerce. The lighthouse bill which finally became law on June 30, 1834 (Wisconsin Exhibit 51), was reported by the same committee. There can be little doubt that the Memorial which so clearly brought about the introduction of the 1832 bill was also instrumental in the introduction and enactment of the 1834 proposal.

signed this petition were certainly in a position to know where the travel went and where the light was needed most.

That the Rock Island light was not built hastily or on the spur of the moment appears from the fact that it was not erected until 1836, although the Merchants and Masters' petition was presented in 1832 and a preliminary survey was made in 1834, as shown by the statement of Bishop Kemper, that—

> "When at Potawatomie or Louse island the Capt took the Collector ashore to fix upon a scite for a light house the Government has ordered to be built"[53]

After the Rock Island lighthouse was built there was apparently no doubt that it was put at the right place. In this connection, we quote from a letter of John F. Wight to Lieut. Pendergrast, dated May 20, 1837. Mr. Wight says:[54]

> "Sir: In answer to your inquiries of yesterday, 'touching the expediency of erecting a light-house at the entrance of Green bay'—
>
> 1st. The safety of navigation requires a light-house at the entrance of Green Bay, and I think Louse island the proper point.
>
> 2d. It is of sufficient importance to justify the expense.
>
> I have understood that a light-house on Louse island was in progress; if so, and the present light-house is intended for the head of Green Bay, I think Sail point the proper place.
>
> Yours, respectfully,
> JOHN F. WIGHT"

Turning now to the lights in Death's Door, we find that until 1848 no light was placed there. Wisconsin Exhibit 171, an official chart published in that year, shows the Rock Island light to be the only light in the region.[55] Thurlow Weed,

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[53] Wisconsin Exhibit 50, p. 1.

[54] Wisconsin Exhibit 52, p. 7. This letter was written in reply to a request by Pendergast for information.

[55] A part of this chart is printed in the supplement, Figure 24.

writing of a trip on Lake Michigan in 1847, and referring to the Grand Traverse region, makes the following statement:[56]

> "These waters are seldom traversed, and human footsteps are rarely set upon these islands. A single lighthouse, with an occasional land-mark, is all that we have seen, indicating that our Government has recognized the existence of this most interesting portion of our common country. * * *"

Earlier in his account, Mr. Weed describes Death's Door, so it is obvious that if there had been any lighthouse there he would have seen it.

The first lighthouse to be built in Death's Door was built about the year 1848, on Plum Island.[57] An appropriation of $3500 for the building of a lighthouse in Death's Door was made by Congress, in August, 1848.[58] The light was built in the same year or in 1849.[59] The witness William Betts testified that a government light was burning on Plum Island when he first passed that place in 1855, but that it was discontinued when Pilot Island light was built in 1858, and that the lighthouse fell into ruins.[60]

Farmer's Map of 1853 shows lighthouses on Rock Island, Plum Island and Pilot Island.[61] Graham's Official Sketch of

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[56] Wisconsin Exhibit 67, p. 1.

[57] Wisconsin Exhibit 174, a blueprint map, shows that the entire island was reserved for lighthouse purposes in 1848, but it is recited that the first buildings were built in 1897.

[58] Wisconsin Exhibit 51.

[59] This fact does not appear in the record, but is found on page 537 of the book entitled "Compilation of Public Documents and Extracts from Reports and Papers Relating to Light-Houses, Light-Vessels, and Illuminating Apparatus, and to Beacons, Buoys, and Fog Signals. 1789–1871," printed by the government printing office in 1871. It is there stated that $3500 was appropriated for a lighthouse at Death's Door, and that the light was built and put into operation for $3125.80.

[60] R. pp. 30–31, 39–40.

[61] Wisconsin Exhibit 172, part of which is printed in the supplement, Figure 25.

1863 shows lighthouses on Rock Island and Pilot Island, but none on Plum Island.[62]

The present lighthouse on Plum Island was built in 1896 or 1897.[63]

Going back to 1837, we find that Lieutenant Pendergrast, the officer who was sent by the Board of Navy Commissioners to make a survey of the need for lighthouses on the western lakes, reported that (1) there was a light on Rock Island; (2) a light was needed in Death's Door; but (3) there was more need of a light at the head of Green Bay than in Death's Door. In support of the last mentioned point, we quote the following:[64]

"NAVY COMMISSIONER'S OFFICE,
*December* 15, 1837.

"The reasons assigned by Lieutenant Pendergrast induced the board to believe that, instead of an other light at the entrance of Green bay, the interests of commerce and navigation would be more promoted by placing one near the head of the bay. They have therefore advised a suspension of this expenditure of the appropriation until the further pleasure of Congress can be expressed upon the subject.

I. CHAUNCEY.

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Green Bay, *July* 7, 1837.

SIR: In obedience to my instructions from the Navy Board, I have examined the entrance of Green bay, with a view to the selection of a suitable site for a light-house, and have the honor to report:

That I have found several islands lying at the entrance of the bay, on one of the northern of which (Louse island) there is already a lighthouse erected.

There is, however, another passage into the bay, about twenty miles to the southward, which is used by vessels

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[62] Wisconsin Exhibit 173.
[63] Wisconsin Exhibit 100, p. 2; Wisconsin Exhibit 174.
[64] Wisconsin Exhibit 52, pp. 5–6.

bound from Green bay up Lake Michigan, and I have been urged by some to place a light in this passage. But I have arrived at the conclusion that, although a light is much needed in this southern passage, there are still stronger reasons for erecting one at the *head* of Green bay, near the mouth of Fox river. I have accordingly selected a spot near the centre of Grassy island, as the most eligible place, and beg leave to recommend the erection of a light at that point without delay * * *"

The exhibits and testimony above referred to make it possible to give the following brief statement of lighthouse history in this region:

1. The first lighthouse in the region was built on Rock Island in 1836, and has been in operation continuously ever since. It was established in response to the urgent request of people interested in the shipping business, and was built only after careful consideration had been given to the question of location. Until 1848 it was the only lighthouse at the entrance to Green Bay. There was no doubt that it was put at the right place and not until other parts of the channel to Green Bay were properly lighted was it considered necessary to put a light in Death's Door.

2. The first light in Death's Door was built on Plum Island, in 1848. It was discontinued about ten years later.

3. The third light in the region was built on Pilot Island, near the entrance to Death's Door, in 1858, and has been in operation ever since.

4. The present Plum Island light in Death's Door was built in 1896.

### Course Taken by Ships After 1850

There is a vast amount of evidence in the record relative to the present use of the two channels, and also the course taken by ships when men who are now very old were in their youth. None of this evidence directly deals with conditions prior to

1850 and we do not feel that it has much materiality in determining what was the most usual channel in 1836. The introduction of this class of evidence was commenced and principally carried forward by the State of Michigan, over Wisconsin's objection. While we are not impressed with its materiality, yet we shall give some space to its analysis and discussion, for we feel that even on Michigan's evidence Wisconsin's contentions are easily sustained.

Although much of this evidence dealing with subsequent dates was introduced by Michigan, we shall include in the present summary a few of Wisconsin's exhibits which indicate the channels used after 1850.

Wisconsin Exhibit 164 is a map showing the route of the Fox and Wisconsin Rivers in 1853, and incidentally showing by dotted line the course taken by ships from Lakes Huron and Superior and Michigan, into Green Bay. It will be observed that but one such course is indicated into Green Bay, and that it passes north of Rock Island.[65]

Turning now to Disturnell's Map of 1865, taken from his pamphlet "The Great Lakes" we find that steamship routes are indicated, and that the only one shown passing from Lake Michigan into Green Bay goes north of Washington Island.[66] Disturnell was a prolific publisher of maps and travelers' guides for many years, and it would seem safe to assume that he tried to include the principal routes then in use.

Wisconsin Exhibit 72 consists of the chapter on Green Bay found in Thompson's Coast Pilot of 1865. An examination of the exhibit shows that Rock Island passage is given as the route from the east and northeast into Green Bay,[67] while Death's Door is mentioned only as a route from Chicago to Green Bay. This Exhibit shows a fact which is apparent from

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[65] A part of this map appears in the supplement as Figure 21.

[66] Wisconsin Exhibit 166. A part of this map is printed in the supplement, Figure 22.

[67] Page 17 of the book.

a large part of the testimony to which we shall presently refer, viz., that after 1850 the channel used by ships depended principally upon their destination, those plying between Green Bay and Mackinac and the lower lakes taking the Rock Island passage, and those running between Green Bay and Chicago and other southern Lake Michigan ports using Death's Door.[68] As we shall presently point out, this generalization must be qualified by noting that in stormy weather and in certain conditions of the wind, even Chicago boats could not then, and cannot now, pass through Death's Door.

Wisconsin's answer to the inferences which Michigan tries to draw from the fact that Chicago commerce largely passes through Death's Door is, that in 1836 and prior thereto there was a negligible amount of commerce between Green Bay and Chicago or any other southern Lake Michigan port, whereas there was a flourishing commerce between Green Bay and Mackinac.[69]

A glance at the government charts of Green Bay published in 1922 will show that navigation courses, from place to place, are indicated by dotted lines, and that the courses from the north and east into Green Bay all go through Rock Island passage or the channels north of it, whereas some of the courses from southern Lake Michigan go through Death's Door, while others go through the Rock Island passage.[70] These charts thus show again that all commerce from the east and north, as well as some from southern Lake Michigan, uses the Rock Island passage, while nothing but a part of the southern Lake Michigan commerce customarily passes through Death's Door.

We now turn from documentary evidence to testimony of living witnesses.

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[68] For testimony to the same effect, see brief, pp. 188–189.
[69] This proposition is developed on pp. 189–240 of the brief.
[70] Michigan Exhibits 114 and 116.

Michigan's witness William Betts, who came to the Green Bay region in 1855 and who had a long career as sailor and lighthouse keeper, testified that most of the Chicago boats in his day came through Death's Door, and that all of the Mackinac and lower lake boats took the Rock Island passage.[71]

Michigan's witness Jacob Young, who came to the vicinity in 1865 and has been sailor and lighthouse keeper for many years, testified to the same effect as Mr. Betts.[72] Mr. Young added the observation that in the "early days" Rock Island passage had the most vessels.[73]

Captain C. O. Pederson, a Michigan witness and an old sailor, testified that over 90 per cent of the boats that went through Death's Door during his time were headed towards the southern part of Lake Michigan.[74]

Captain James K. Allger, a Michigan witness who lived on Washington Island as a child and sailed for many years on Green Bay, testified that in his day most of the Green Bay traffic went to Chicago, and that all that went to or came from Chicago passed through Death's Door.[75]

Michigan's witness Martin Knudsen, who came to Washington Island in 1866 and had a long experience as lighthouse keeper, summed the matter up thus:[76]

> "Well, if they were bound to the south ports they took Death's Door passage, and if they were bound the other way, why, they went through Rock Island."

Michigan's witness Captain Frank B. Root, who commenced sailing in Green Bay about 1868, testified that all traffic heading for the lower lakes, Detroit, Cleveland and Buffalo and

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[71] R. pp. 33–35.
[72] R. pp. 46–47, 49–50.
[73] R. p. 46.
[74] R. p. 17.
[75] R. pp. 124, 131.
[76] R. pp. 57–58.

those regions, went through the Rock Island passage out of Green Bay.[77]

### Commercial Routes in 1836

As we have pointed out above, the evidence submitted by Michigan, when construed most favorably for that State, proves only that the channel customarily taken by vessels within the memory of men now living, has depended principally upon the destination of the particular vessel, ships plying between Green Bay and Mackinac taking the Rock Island passage, and those operating between Green Bay and southern Lake Michigan ports generally taking Death's Door—at least in fair weather. As we have also suggested above, we do not consider this evidence particularly persuasive in the consideration of conditions as they were in 1836. However, we shall now assume, without conceding, that in 1836 and before that time the channel taken by vessels depended upon their destination in the same way as it now does; and we shall attempt to show that even upon that assumption the Rock Island passage must have been the most usual channel, because in and prior to 1836 there was much traffic between Green Bay and Mackinac, and very little between Green Bay and Lake Michigan ports. Hence most of the boats must have gone through the Rock Island passage, and that must have been the "most usual ship channel."

In attempting to demonstrate that in and prior to 1836 most of the traffic into and out of Green Bay was Mackinac traffic, we shall develop the following propositions:

1. Both Green Bay and Mackinac were at that time much more important places than any Lake Michigan ports, and naturally, therefore, the bulk of the shipping was between the two localities.

2. The Mackinac–Green Bay route was a link in one of the

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[77] R. pp. 78–80.

principal trade routes from the East to the upper Mississippi valley, and for that reason a vast commerce passed over the route.

3. Actual statistics show that there was more commerce between Green Bay and Mackinac than between those ports and Chicago or any other southern Lake Michigan port. In this connection we consider

a. Customs receipts.
b. Value of imports and exports.
c. Vessel arrivals and tonnage.

4. The exports from Green Bay were not needed in Chicago or other southern Lake Michigan ports, and hence were probably not sent there, while Chicago had no exports worth mentioning until 1836, and none of her products could have been wanted in Green Bay.

a. What the exports were.
b. What the two localities needed and where they got it.
c. Special attention given to the lumber trade.

## 1. In And Prior to 1836, Green Bay and Mackinac Were Much More Important Places Than Any on Lake Michigan.

### Early importance of Green Bay.

To give a proper picture of the importance of Green Bay in the decade or two immediately preceding the designation of the boundary in 1836, we shall advert to a considerable number of historical facts appearing in the record.

The locality where the city of Green Bay now stands was first visited by white men in 1634 or 1639, when Jean Nicollet landed there on an exploring expedition from Quebec.[78] As

[78] Wisconsin Exhibit 49; Michigan Exhibit 124, p. 11.

early as 1654, fur traders were operating in the vicinity of the present city of Green Bay.[79] Thirty-one years after Nicollet landed, the celebrated French-Canadian explorer and adventurer Nicholas Perrot visited the bay and spent some time among the Indians there.[80] In 1669 Father Claude Allouez established a Jesuit Mission at De Pere, just south of the present city of Green Bay.[81] La Salle came to Green Bay in 1679, in the "Griffin," the first sailing vessel on the western Great Lakes.[82] Other celebrated travelers to visit the Bay were Marquette and Joliet, who passed through there on the expedition which resulted in the discovery of the Mississippi River, and Charlevoix, who landed in 1721 and found French trading posts there.[83]

The first permanent settlement of Green Bay was made in the year 1745, by Augustine and Charles De Langlade.[84] By 1754 Green Bay was a sufficiently important commercial point to require a garrison of six men, and for the trade of its department thirteen canoes of goods annually, costing a total of about $18,000.[85] A detachment of British troops took possession of the post in 1761, but abandoned it two years later during Pontiac's war.[86]

In 1766, the English explorer Jonathan Carver stopped at Green Bay on his way from the East to the Mississippi. He describes the settlement as follows:[87]

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[79] Wisconsin Exhibit 73.
[80] Michigan Exhibit 57, p. 2.
[81] Michigan Exhibit 128, pp. 11–14; Wisconsin Exhibit 73; Michigan Exhibit 124, p. 11.
[82] Wisconsin Exhibit 73; Michigan Exhibit 124, p. 1.
[83] Michigan Exhibit 124, pp. 11–12; Michigan Exhibit 128, pp. 14, 16–17.
[84] Wisconsin Exhibit 73; Michigan Exhibit 124, pp. 11–12.
[85] Wisconsin Exhibit 312, p. 2.
[86] Michigan Exhibit 124, p. 12.
[87] Michigan Exhibit 95, pp. 1–2.

"This Fort, also, is only surrounded by a stockade, and being much decayed (Page 22) is scarcely defensible against small arms. It was built by the French for the protection of their trade, some time before they were forced to relinquish it; and when Canada and its dependencies were surrendered to the English, it was immediately garrisoned with an officer and thirty men. These were made prisoners by the Menomonies soon after the surprise of Michillimackinac, and the Fort has neither been garrisoned or kept in repair since.

* * *

A few families live in the Fort, which lies on the west-side of the Fox River, and opposite to it, on the east side of its entrance, are some French settlers who cultivate the land, and appear to live very comfortably"

As early as 1809, a saw mill was built near Green Bay.[88]

In 1815 the American Fur Company was doing such a thriving business at Green Bay that the United States government decided to reap some of the rewards for itself, and accordingly in that year itself established a "factory," or trading post, there. $15,000 worth of goods were sent to this "factory" as trading stock.[89]

Fort Howard was erected by the United States government in 1816.[90]

By 1820, Green Bay was estimated to have from forty-five to forty-eight families there resident, the total population is said to have been about five hundred, and there were over sixty dwelling houses.[91] In that year the United States government built a saw mill at Little Kakalin, a few miles up the river from the present city of Green Bay[92], and the fur business was so flourishing that the American Fur

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[88] Wisconsin Exhibit 73.
[89] Michigan Exhibits 140 and 141.
[90] Michigan Exhibit 124, p. 12.
[91] Michigan Exhibit 57, p. 5; Michigan Exhibit 124, p. 12.
[92] Michigan Exhibit 57, p. 5.

Company alone sent $15,000 worth of goods to its agents in Green Bay. This figure does not include the goods shipped to independent traders.[93]

Prior to 1825 the site of the present city of Green Bay was known by a variety of names, referring to the various small settlements in the locality. There were, for instance, Fort Howard, La Baye, De Pere and Shantytown, among other names. In 1825 one John Laws platted a part of the land in the neighborhood and gave it the name of Menomineeville.[94] Five years later, Daniel Whitney platted the town of Navarino[95] and in 1835, Messrs. John Jacob Astor, Ramsey Crooks, and Robert Stuart laid out the town of Astor.[96]

Coming now to the year 1826, we find in the record a report of the exports of Wisconsin, a territory of which Green Bay was the gateway. We quote the following:[97]

> "The annual exports from this Territory have been estimated to consist of furs and peltries valued at $300,000; white fish, 800 to 1,000 bbls.; sugar, 100,000 lbs.; and lead, in 1826, 958,842 lbs.; and in 1827, 5,182,180 lbs.
>
> The commerce upon the upper lakes has increased rapidly within a few years. At Green Bay, vessels arrive and depart; almost weekly during the Spring, Summer and Autumn"

We call especial attention to the above bit of evidence, for the figures given indicate more plainly than any description the very considerable importance of Green Bay as a commercial center and the great volume of business done there.

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[93] Wisconsin Exhibit 312, p. 3.
[94] Michigan Exhibit 57, p. 6.
[95] Michigan Exhibit 57, p. 7.
[96] Michigan Exhibit 57, pp. 8, 9.
[97] Wisconsin Exhibit 85.

It is worthy of note that neither lumber nor any other wood product is mentioned as a material export of the region. The significance of this fact will become apparent in another connection.[98]

In 1827 Green Bay was a sufficiently important place to be chosen as the destination of a pleasure excursion on the steamer "Henry Clay".[99] Every year, from then until 1832, there were annual passenger excursions made to Green Bay, in which two or three steamboats took part.[1]

It appears that Governor Cass of Michigan Territory was in Green Bay at the time of the 1827 excursion, holding a parley with the Indians, and after the treaty was concluded he returned to Detroit on the excursion steamer. The exhibit continues:

> "From that period to 1832, some of the boats went to Green Bay, but no further."

In 1831 Green Bay was again chosen as the seat of a council held for the purpose of negotiating a new Indian treaty.[3]

Between the years 1826 and 1829 one important item in Green Bay's trade increased tremendously in volume. In the former year, 958,842 pounds of lead were exported from Wisconsin, much of it undoubtedly by way of Green Bay.[4] In 1829, Judge Doty[5] estimated that the amount of lead shipped was 10,000,000 pounds, an increase of 1000 per cent.[6] Judge Doty speaks of the importance of the in-

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[98] See pp. 234–240 of this brief.

[99] Wisconsin Exhibit 66.

[1] Michigan Exhibit 124, pp. 4–5.

[2] Wisconsin Exhibit 66.

[3] Wisconsin Exhibit 309.

[4] Wisconsin Exhibit 85.

[5] James Duane Doty was United States Circuit Judge and later became Governor of Wisconsin Territory.

[6] Michigan Exhibit 57, pp. 10–11.

dustry for the lower Fox River Valley, so it is safe to assume that his figure of 10,000,000 pounds refers to lead shipped by way of Green Bay, and does not include that shipped on the Mississippi. In the same year, 1829, Judge Doty estimated other important exports of Brown County, which was that part of Michigan territory tributary to Green Bay, as follows: furs and peltries, $200,000, white fish 800 to 1,000 barrels, maple sugar 200,000 pounds.[7] Again it is noteworthy that lumber is not mentioned as an export of the locality.

As this survey of Green Bay's early importance is here considered chronologically, we now refer again to the fact that in 1830 the town of Navarino was platted.[8]

In the period of which we have been speaking, most of the grain raised in the Green Bay region was used for feeding cattle, and flour for human food was shipped in from Ohio by way of Lake Erie.[9] The inhabitants were dependent upon Ohio and Michigan for everything like provisions, except a limited quantity of grain and vegetables raised in the vicinity.[10]

In 1831, one Samuel Stambaugh made an extensive economic survey of the Green Bay region, and a part of his official report to the Secretary of War appears in the record.[11] We quote the following from it:

> " 'Green Bay settlement,' in the township of Green Bay, is the seat of Justice for Brown county; and is situated immediately at the head of the Bay, in 44° 40" of N. latitude, and 87° of W. longitude. It embraces a tract of country, commencing at a point about half a mile above the entrance of Fox River, and ex-

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[7] Michigan Exhibit 57, p. 12
[8] Michigan Exhibit 57, p. 7.
[9] Wisconsin Exhibit 94, p. 2.
[10] Wisconsin Exhibit 71, p. 5.
[11] Wisconsin Exhibit 94, pp. 1-2. Stambaugh's report is also quoted in part in Michigan Exhibit 150.

tends up and along the river on both sides, six miles, running back on each side, three miles, so as to form a square containing a township or twenty three thousand and forty acres of land. This tract has been confirmed to individual claimants, under Acts of Congress, passed in the years 1820, '23 & '28. There are about a hundred dwelling houses scattered over the settlement, nearly an equal number on each side of Fox River, which runs a N. E. course through the centre of it, but none of them are above found hundred yards distant from its margin. The land is not cleared at any point more than half a mile back from the river, and I have estimated the whole quantity of land cleared and under any kind of cultivation within the confirmed claims, at two thousand five hundred acres! The remainder is a wilderness.— There is, perhaps, the greatest quantity of land under cultivation on the West side of the River, and certainly the best crops are raised on that side. But the farming is entirely different from what I have been accustomed to see—the inhabitants are principally Canadians, who came to the country as Traders or Voyageurs, and are but indifferent cultivators of the soil. The few American citizens located here, have heretofore, generally, been engaged in the Indian Trade and mechanical occupation. None of them until within the last two years had turned their attention to farming; but they have already received convincing proofs of the fertility of the soil, and its adaptation to the growth of wheat, rye, corn and clover; as well as to vegetation of every description. Vegetables of a root kind, especially potatoes, beets and turnips, are produced in surprising quantities; and I do not believe they are equalled in size or quality, by the growth of Pennsylvania or New Jersey.

There is but one Grist Mill in the Menominie country, or indeed within several hundred miles of it; and it is so badly constructed that it can do but little business. It is located eighteen miles above the settlement, on Fox River, at the rapids called the 'Grand Kaccalin;' and is on a confirmed claim, occupying near

a mile square, which is the only claim confirmed to citizens in the Menominie country, besides those I have described as constituting the Green Bay settlement. In consequence of being thus destitute of the means of having their grain manufactured into flour, the great bulk of the wheat raised by the inhabitants, is used for feeding cattle, and the flour required for the sustenance of the population is principally brought from the mills in Ohio, bordering on Lake Erie. The quantity of this article consumed here annually, does not fall short of fifteen hundred barrels, exclusive of the supply imported for the use of the garrison, and for the Indian Department.

Fort Howard is located on the best land of Fox River, less than a mile above its entrance into Green Bay. It occupies an elevated and commanding position; which, by a curve in the course of the river below gives it entire command over the pass by water to and from the settlement. The ground occupied by the Garrison is within the boundary of the confirmed claims, and the Fort stands about half a mile above the lower line of this boundary. The law of 1828, confirming these claims, has a proviso reserving a quantity of land sufficient for military purposes, and the surveyor employed by the Government to fix the boundary lines did not make a survey of the land in the vicinity of the Fort, in consequence of instructions to that effect, founded upon the above reservation. Notwithstanding the prohibitions of the law, however, plainly as they are expressed, the inhabitants erected numerous small buildings on this reservation, which have generally been converted into grog shops, and are a very great annoyance to the Garrison. This subject, I have understood, has frequently been urged upon the attention of the Department, and I think it worthy of serious consideration. I have now given you a concise geographical sketch of the Menominie country, generally, and have attempted to add a statistical view, more particularly, of the Green Bay settlement".

In the autumn of 1832, treaties were negotiated with the Menominee, Sauk and Winnebago Indians, voiding their title to all of the lands south and east of the Fox and Wisconsin Rivers. In 1834 and '35, these lands were surveyed and opened up for settlement, and there began a rapid growth in the population of the Green Bay region.[12] In 1834 a government land office was opened at Navarino and immediately there was a great rush to purchase land. We quote the following from Miss Martin's History of Brown County:[13]

> "A land office was opened at Navarino with Samuel W. Beall as receiver, and William B. Slaughter, register. Morgan L. Martin had united with Solomon Juneau in 1833 in platting the town site of Milwaukee, and at this historic land sale were to be found the plats of that village and Navarino. The latter was considered by far the most desirable place in which to locate, and town lots rapidly rose in value from fifty to twelve hundred dollars. During the summer of 1835–36 excitement rose to fever heat, every steamer and schooner brought settlers; speculators also crowded in who purchased land at government prices which they sold to later comers for treble the amount. Moneyed men from Detroit and other cities invested heavily, the sales in four days alone reaching the sum of seventy-five thousand dollars."

In 1834 the transportation business in the neighborhood of Green Bay was apparently prospering, for we read that one Bressette went into the boat building business at that time, making boats large enough to carry 20 tons of merchandise. In that one year he built a total of thirty boats, ten for one Whitney, seven for the United States government, and thirteen for the American Fur Company.[14] These were river boats designed for the navigation of the Fox River, and the

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[12] Michigan Exhibit 57, p. 8.
[13] Michigan Exhibit 57, pp. 8–9.
[14] Wisconsin Exhibit 64, p. 6.

number constructed by Bressette shows the great importance of that river as an artery of commerce in that day. All of the Fox River traffic, of course, passed into the Great Lakes by way of Green Bay.

In 1835, thirty-eight ships are listed as entering and leaving Fox River. Eight of these were steamers.[15]

As we have previously stated, the town of Astor was platted by Messrs. Astor, Crooks and Stuart, in 1835.[16]

In the same year, the Michigan legislature incorporated the Bank of Wisconsin, which forthwith opened business in the town of Astor with a capital stock of $100,000.[17]

By this time the Green Bay region had become such an important part of Michigan territory that Governor Mason issued a proclamation assembling the Territorial Legislative Council at Green Bay. The Council met there on January 1, 1836,[18] a fact which has a very particular significance upon which we shall comment later.[19]

In 1836 the educational requirements of this important community were such that a private school was opened, in which instruction was given not only in the elementary subjects, but in astronomy, geography, Latin and some of the higher branches of mathematics.[20]

In 1836, the imports of Green Bay amounted to $392,291 in value, and her exports were $56,660.[21] In the same year a single Green Bay firm shipped $6,000 worth of furs to the American Fur Company.[22]

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[15] Michigan Exhibit 57, p. 17.
[16] Michigan Exhibit 57, pp. 8, 9.
[17] Michigan Exhibit 57, p. 13.
[18] Michigan Exhibit 57, pp. 12 and 13.
[19] Brief, pp. 316–317.
[20] Michigan Exhibit 57, p. 16.
[21] Wisconsin Exhibit 325.
[22] Wisconsin Exhibit 312, p. 3. The following statement is made in Wisconsin Exhibit 83, which is an extract from "The Charac-

The first United States court in Wisconsin was held in Green Bay.[23]

In connection with the above survey of the development of Green Bay in the early days, it is perhaps worth noting that in 1830 the total population of Wisconsin was 3,245; in 1836 it was 11,688, and in 1840, 30,945.[24] Under these conditions, the importance of Green Bay was of course infinitely greater relatively than absolutely. Until 1830, it was the only settlement in the eastern half of Wisconsin.[25]

**Other ports on Green Bay.**

We have shown above that the locality where the city of Green Bay now stands was in 1836, and had been for a great many years prior thereto, a very active and important frontier commercial post and point of trans-shipment. We shall now consider briefly the other early ports on the shore of Green Bay.

So far as appears from the record, there were but two centers of settlement on Green Bay in the 30's, aside from the towns at the head of the bay which we have already discussed, and the small settlement on Rock Island which was established in 1835.[26] One of these two settlements was at or near the mouth of the Menominee River, where the cities of Menominee

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ter and Influence of the Indian Trade in Wisconsin," by Frederick J. Turner:

"* * * The kind and amount of furs brought in may be judged by the fact that in 1836, long after the best days of the trade, a single Green Bay firm, Porlier and Grignon, shipped to the American Fur Company about 3,600 deer skins, 6,000 muskrats, 150 bears, 850 raccoons, besides beavers, otters, fishers, martens, lynxes, foxes, wolves, badgers, skunks, etc., amounting to over $6,000. * * *"

[23] Michigan Exhibit 57, p. 5.

[24] Wisconsin Exhibit 88.

[25] Wisconsin Exhibit 71, p. 1.

[26] Michigan Exhibit 128, pp. 33–36.

and Marinette now stand, and the other was on the site of the present city of Oconto.

Relative to the settlement at the mouth of the Menominee, we quote the following from A. L. Sawyer's History of the Northern Peninsula of Michigan:[27]

> " * * The first important post, or settlement, south of Mackinac was at Green Bay, and we have been unable to learn of but one trader located within the Upper Peninsula to the south of Mackinac in the early years of the 19th century; and that was Louis Chappeau, who located at the mouth of the Menominee river about the year 1800, though there is a conflict of opinion as to the exact date, it having been placed by one writer as early as 1796, and being given by others as about 1805. He is said to have represented George Law, an independent trader who had headquarters at Green Bay.
>
> Here, however, the American Fur Company soon played a winning game, and its representative, William Farnsworth, in 1822, with Marinette as his wife, in company with Charles Brush, came from Michilimackinac to Menominee, and, soon after his arrival, forcibly dispossessed Chappeau, and took possession of his stockade trading post; Chappeau, with his Indian wife and family moving about five miles up the Menominee river from its mouth, where he constructed another stockade, and continued his trade, having with him a number of couriers and helpers"

In 1825 Judge Arndt of Green Bay built a small saw mill on the Pensaukee River, near the present city of Oconto.[28]

In 1831 Samuel Stambaugh, in his report on the quality and condition of Wisconsin territory, had the following to say about the region which we are now considering:[29]

> " * * * I believe that this Country could be cultivated, with great success, as far north as the Menominie

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[27] Wisconsin Exhibit 79, pp. 1–2.
[28] Wisconsin Exhibit 93, p. 2.
[29] Wisconsin Exhibit 94, p. 2.

river, which empties into Green Bay, about sixty miles below this settlement. There are two American Traders located about three miles up this river from its mouth, who raise excellent crops of corn, oats and potatoes. This river has water power equal to Fox river, and it is a still more handsome stream. Messrs. Farnsworth and Bush, the Traders are erecting a sawmill on the premises they occupy, on one of the finest sites I have ever seen. They take, and export every season, from three to eight hundred barrels of White Fish. They catch the fish in a basket, fixed under a dam in the river"

In 1832 there was already established at the mouth of the Menominee river an American Fur Company trading post, where John Kittson acted as clerk, and from which several traders did business.[30]

In the same year the first saw mill at the mouth of the Menominee was built by Messrs. Farnsworth and Brush, and in 1841 one McLeod built the second one.[31] In 1835–6 a dam was constructed at Oconto and mills erected there, but both dam and mills were soon swept away by a flood, and the place was quiescent for a considerable time.[32]

The first steamboat to stop at Menominee landed there in 1836, for the purpose of taking on wood.[33]

It appears from the above evidence, that there was some little commerce and industry on the shores of Green Bay, other than that at the head of the bay. It was not much by present-day standards, but it was not without significance in the '20s and early '30s. To show how important even such small manifestations of commercial enterprise must have been, we quote the following discussion of the surrounding regions from Holand's History of Door County, Wisconsin:[34]

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[30] Wisconsin Exhibit 64, p. 4.
[31] Wisconsin Exhibit 93, p. 1.
[32] Wisconsin Exhibit 93, p. 2.
[33] Wisconsin Exhibit 79, p. 4.
[34] Michigan Exhibit 128, p. 22.

"In 1818 Solomon Juneau settled at the mouth of the Milwaukee River and opened a little trading post for the Indians. For seventeen years he was not only the only settler at what later became Milwaukee but he was also the only one on the entire Lake Michigan shore. From Chicago to Death's Door and south to Green Bay the shore lay dark and mysterious, uninhabited by a single fisherman, farmer or fur trader. Back from the shore the forest stretched in unbroken majesty, haunted only by the wild beasts and savage red men of the wilderness —a country as little known then as some obscure spot of Africa is now"

**Mackinac**

On the preceding pages we have tried to give a picture of the commercial importance of the Green Bay ports in the years preceding 1836. We now turn our attention to the port of Mackinac, or Michilimackinac, as it was then called.

The great extent of the commerce of this place is manifested as early as 1804 by the fact that in that year the United States Government Customs' House at Mackinac collected about $60,000 in duties on goods passing through the port.[35] In the first eight months of the year 1805, the customs' receipts were about $40,000, according to the collector's official report.[36]

The importance of early Mackinac has been summed up in the following words:[37]

"Mackinac Island is the central point of the three great lakes, * * * The history of Mackinac may be divided into five periods.

* * The fourth or fur trading period opened in 1809, when John Jacob Astor organized the American Fur Company with a capital of two millions, and bought out the numerous struggling associations along the straits. *For forty years* this company monopolized the fur trade,

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[35] Wisconsin Exhibit 315, p. 1.
[36] Wisconsin Exhibit 313.
[37] Wisconsin Exhibit 311.

and *Mackinac, the great central market, was the busiest and gayest post on the lakes.* * * Here also the U. S. Government made the annual Indian payments, when the neighboring tribes assembled by thousands to receive their stipend."[38]

Another author speaks thus of Mackinac:[39]

"It soon became, however, a great commercial seat and emporium in the wilderness. The chief commodity was furs. From an early day this had been a business carried on by the individual traders who went among the Indians. In course of time these operations assumed a larger and more systematic form under the hands of strong chartered companies. Of this I shall speak later. The situation of the island in the far northern country, its direct communication by the great lakes with the remotest parts east, south, west and north, and its being the principal seat of white habitation and commerce and military authority on the watery highway, and the key to the whole upper country—all this gave it an extended reputation in that early day. Travellers, sometimes from Europe as well as from our own eastern states, would touch at the island, visit its fort and explore its woods and its natural curiosities even as is done now. The fur trade, together with other lines of traffic which it stimulated, made the Island for many years a great commercial seat * * "

Washington Irving describes Mackinac as it appeared in 1810, in his "Astoria." We quote the following excerpt:[40]

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[38] Italics ours.

[39] Wisconsin Exhibit 315, p. 1.

[40] Wisconsin Exhibit 315, p. 2. Still another description of early Mackinac's commercial activities is given by Clifton Johnston, in Wisconsin Exhibit 317, pp. 1-2:

"One object of historical interest at Mackinac is the hotel that is in part the same structure that was used by John Jacob Astor in conducting his fur business. * * * Its operations at Mackinac covered a period from 1815 to 1842, and during this time the little island in the straits was the chief

"It was not until the 22nd of July that they arrived at Mackinaw, situated on the island of the same name, at the confluence of Lakes Huron and Michigan. This famous old French trading post continued to be a rallying point for a multifarious and motley population. The inhabitants were amphibious in their habits, most of them being or having been *voyageurs* or canoe-men. It was the great place of arrival and departure of the south-west fur trade. Here the Mackinaw Company had established its principal post, from whence it communicated with the interior and with Montreal. Hence its

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center of the fur company's trade and activity. *Three million dollars' worth of merchandise was annually exchanged for furs in the Indian country.* But gradually those pathfinders of the wilderness, the fur-traders, were driven out by the lumbermen, who roughly prepared the region for their successors, the pioneer farmers, and by 1835 the fur business was seriously on the wane. After the winding up of the affairs of the American Fur Company, individual merchants at Mackinac continued the fur trade, but it constantly declined until it entirely disappeared from the island.

Meanwhile the fishing business had become increasingly important. Whitefish and trout in small quantities began to be sent to the Buffalo market about 1824. More and more were shipped as the years passed, and all the fishing grounds for a hundred and fifty miles around brought their catch to Mackinac to be sorted, salted and packed. * * * 164 Four or five small docks reached out into the water from the settlement, and there wasn't another dock between Buffalo and Chicago. The vessels all used to stop to buy supplies, and some would leave goods and take on furs and fish. The steamers loaded up with wood. Their engines didn't burn coal then, and they couldn't have carried enough wood to make one of their long trips without so crowding the decks that there wouldn't have been the necessary room for passengers and cargo. * * *

The Indians came here from all around to trade. They brought furs—mostly mink, fox, and otter, with some bear and lynx skins—and they brought fish. * * *

The government made a money payment here to the Indians each year in the fall, and sometimes we'd have as high as three or four thousand of 'em camped by the shore. * * *
(Italics ours.)

various traders and trappers set out for their respective destinations about Lake Superior and its tributary waters, or for the Mississippi, the Arkansas, the Missouri, and the other regions of the west. Here, after the absence of a year or more, they returned with their peltries, and settled their accounts; the furs rendered in by them being transmitted, in canoes, from hence to Montreal. Mackinaw was, therefore, for a great part of the year, very scantily peopled; but at certain seasons, the traders arrived from all points, with their crews of voyageurs, and the place swarmed like a hive. * * *

* * Mackinac was ever a favorite point in the eyes of the British and all along an object of their strong desire; and they were loath to give it up. * * * that the commissioners of the Crown were more interested in an 'extended commerce than in the possession of a vast tract of wilderness.' The fur trade at that time was the main thing and Mackinac was the gateway of all the fur traffic of the west and southwest fields. And again, it appears in negotiating the treaty of 1815 that the commissioners of the crown, even when feeling obliged to forego a large part of their demands, still held out for the island of Mackinac (and Fort Niagara) as long as possible."

Mrs. John H. Kinzie visited Mackinac in 1830 and speaks of the place as follows, in her book "Wau-bun."[41]

"* * * These were the palmy days at Mackinac. As the headquarters of the American Fur Company, and the entrepot of the whole North-West, all the trade in supplies and goods on the one hand, and in furs and products of the Indian country on the other, was in the hands of the parent establishment or its numerous outposts scattered along Lakes Superior and Michigan, the Mississippi, or through still more distant regions"

In 1831 Samuel Stambaugh, in a report on Wisconsin territory which has already been mentioned, takes occasion to

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[41] Wisconsin Exhibit 95, p. 1.

point out that the principal artery of commerce from Green Bay to the East is by way of Mackinac.[42]

The decline in the fur trade which took place in the '30s and '40s was at least partially compensated for by a growing business of catching and shipping fish. We quote the following from Wisconsin Exhibit 314:

> "The Fisheries.
>
> With the decline of the fur trade the fishing business became prominent, and the voyageurs, Indians, and their boats and outfits, that had been so successfully used, were utilized for that purpose. * * *
>
> * * As early as 1824 whitefish and trout, in small quantities, salted and packed in barrels, were caught and sent to the Buffalo market. All the fishing grounds for one hundred and fifty miles, or more, around sent their catch to Mackinac Island, where the fish were assorted, resalted, repacked in barrels ready for shipment. From 1854 to 1860 the trade in salted fish increased to over two hundred and fifty thousand packages, valued at more than one million dollars. * * *"

As late as 1847 the tonnage of shipping at Mackinac was 1288, as against 3951 for Chicago.[43] It appears that the customs receipts at Mackinac were greater than at Chicago until 1847.[44]

Michigan's witness William McDonald, who was born on Washington Island about 1860, testified that even as late as the days of his earliest recollection, most of the traffic out of Green Bay headed towards Mackinac instead of towards southern Lake Michigan.[45]

**Chicago.**

We have already shown that for several decades prior to the designation of the Michigan boundary in 1836, both Green

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[42] Michigan Exhibit 150, pp. 3–4.
[43] Wisconsin Exhibit 326.
[44] Wisconsin Exhibit 70, p. 5.
[45] R. p. 353.

Bay and Mackinac were very important commercial centers, that there must have been a busy and very considerable amount of shipping between them, and that it would use the Rock Island passage. We shall now set forth some of the evidence relative to early Chicago, to show that prior to 1836 it was never enough of a place to have much commerce.

The first permanent settlement at Chicago was not a settlement proper but a government military post, established in 1803 and named Fort Dearborn. It had originally been intended to locate this post at St. Joseph, on the east shore of the lake, but some difficulty arose in securing title from the Indians, and so the fort was erected at Chicago.[46] That it was not a very flourishing place appears from the following statement taken from the record.[47]

> "Mrs. John H. Kinzie, daughter-in-law of John Kinzie, the first permanent settler at Chicago, says respecting the lake navigation for a few years after the fort was established there in 1804; 'The vessels came in the spring and fall (seldom more than two or three annually) to bring the supplies and goods for the fur trade, and took the furs already collected to Mackinac, the depot of the Southwest and American Fur companies. At other seasons they were sent to that place in boats, coasting along the lakes,"

Major Long's expedition visited Chicago in 1825, and the impression which the settlement produced upon the visitors appears from the following statement made by the reporter of the expedition:[48]

> " 'As a place of trade it (Chicago) offers no inducement to the settler; for the whole amount of the trade of the lake did not exceed the cargo of five or six schooners, even at the time when the garrison received its supplies from Mackinaw' "

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[46] Michigan Exhibit 124, p. 2.
[47] Michigan Exhibit 124, p. 2.
[48] Wisconsin Exhibit 84, pp. 1–2.

A picture of Chicago in the late '20s may be found in E. A. Riley's "Development of Chicago":[49]

> "The development of Chicago from this time until 1830 was very slow. At the latter date its population, outside the fort, was only seventy. * * * As late as 1827 there were but two families in Chicago residing outside the fort. There was little commerce with the surrounding country. In addition to supplying the meager wants of the Indians, the annual yield of furs was bought and forwarded to the Eastern factories of the Company. Supplies for the garrison were obtained either from St. Louis by way of the portage, or, as was more general, by schooner from the East. * * *
>
> * * * Thus the year 1830 found the territory which we have called Chicago and vicinity with but two settlements—Milwaukee and Chicago. Milwaukee contained but a single family engaged in the Indian trade and Chicago consisted of a small fort, whose garrison numbered ninety-five men and a village of log houses sheltering seventy inhabitants. The slaughtering of cattle and hogs to supply fresh meat for the garrison and villagers was the only manufacturing industry, and the only other business of the place was the trade with the Indians and the furnishing of board and lodging to the passing traveler. Not even a saw mill had been erected, nor a schooner of lumber received * * *"

In 1830 there were perhaps one hundred people on the site of what is now Chicago, including government agents, troops and Indian traders. In 1831, there was but a single store in the locality.[50]

The first steamboat made its appearance in Chicago in 1832.[51] At that time there was no harbor accessible to any craft drawing more than two feet of water.[52] A year later,

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[49] Wisconsin Exhibit 96, p. 4; Wisconsin Exhibit 84, p. 1.
[50] Wisconsin Exhibit 69, p. 1.
[51] Wisconsin Exhibit 67, p. 7; Wisconsin Exhibit 86, p. 1.
[52] Wisconsin Exhibit 86, p. 3.

in 1833, harbor conditions were no better, and we read of three travelers who sailed a yacht from Oswego to Chicago, and were then forced to leave their craft outside the sand bar, go ashore and hire eight yoke of oxen to drag their vessel over the barricade into the river.[53]

Chicago in 1832 is described as follows by one who visited there in that year:[54]

> "The whole population of Chicago at that period, aside from a company of troops stationed there, did not exceed 45 or 50 souls. But few traces of civilization could be seen, after passing the Straits of Mackinaw. Nothing like lighthouses, or beacon lights, artificial harbors, and but few natural ones were in existence; no piers, wood or coal yards were established, and not a single village, town or city in the whole distance. Chicago then had but five buildings, three of which were log tenements; one of them, without a roof, was used as a stable; and two small frame dwelling houses, besides the lighthouse and barracks, better known as Fort Dearborn, which was evacuated for the accommodation of the sick troops. Major Whistler and Capt. Johnson of the army, and many others with their families, took shelter wherever they could — some in tents, others under boards placed obliquely across fences"

Coming to the year 1833, we read the following concerning the legal organization of the town and its population:[55]

> "Chicago from 1833 to 1837—The close of the year 1833 found Chicago a legally organized town. Its population at the time has been variously estimated at from one hundred and fifty to one thousand. No record of any enumeration of the inhabitants is extant, and all statements as to the actual population at that time are estimates, based on the whims, impressions, or rumors of the time. It required a population of 150 to form a corporate

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[53] Michigan Exhibit 124, p. 10.
[54] Wisconsin Exhibit 86, p. 2.
[55] Wisconsin Exhibit 69, p. 3.

town organization, and it is not probable that Chicago had more than the required number. Based on the number of voters (twentyeight) at the first election, and allowing a population of five to each voter, the resident population was 140 in August, 1833, at the time the first election was held. The influx drawn in during the Indian treaty, in September, added largely to the permanent population of the town, as many who came here at that time remained. The population on January 1, 1834, was not far from 250. * * *"

The history of Chicago in the next few years is graphically described by Thurlow Weed, reporting a visit to Chicago which he made in 1847.[56]

"These waters are seldom traversed, and human footsteps are rarely set upon these islands. A single light-house, with an occasional land-mark, is all that we have seen, indicating that our Government has recognized the existence of this most interesting portion of our common country. * * *

* * * Thus, it will be perceived, that Chicago, though visited by the French nearly two hundred years ago, and perhaps marked out by them as one of the links in their immense chain of posts connecting the St. Lawrence with the Gulf of Mexico, and for a period of nearly thirty years afterward, occupied as a frontier military post, and a trading-station connected with it, could not, previous to the period we have named, 1832, have had a permanent existence as a town. The united population, never exceeding one hundred, came here for temporary purposes, and not with the design of remaining permanently and settling the country. No attempt was made to cultivate the soil; supplies of all kinds were brought at great expense from the East. The country around, in every direction, was unsettled and full of Indians. Illinois, it is true had been admitted into the Union in 1818, with a population of about 30,000; but they were confined chiefly to the southern part of the State, immigration

[56] Wisconsin Exhibit 67, pp. 2–3.

having been derived principally from Virginia and Kentucky.

The Black-Hawk war occurred in 1832, and it was this event, more than anything else, which first brought Chicago and this region into notice, and laid the foundation for a permanent settlement. During the progress of this brief contest, many persons attached to the army, and others, visited this place, and explored the country between the Lakes and the Mississippi. Being highly pleased with the country, on their return to the East, they naturally communicated their impressions to others, and created a general desire to remove and settle here, which in process of time was carried into an execution. The successful issue of the war removed danger from the frontier, and immigration was safe. It was besides, as will be remembered, a period of unusual prosperity throughout the country, when enterprise was stimulated to extraordinary activity. These causes combined, in the latter part of 1832 and the spring of 1833, produced immigration. Lands and town-lots were eagerly sought after; speculation naturally resulted; which soon became the ruling passion of the period, and was only arrested by the universal crash and bankruptcy of 1837–8. Chicago became the centre of speculating operations, and enjoyed or *suffered* during its continuance, and inflated prosperity. Thousands flocked here from all parts of the country and the place was thronged with new citizens and strangers.

* * *

* * * Down to 1837, as before intimated, very little was done at Chicago but *operate* in real estate. Very little or nothing was raised. Domestic wants of the community even, were supplied from the East. Vessels rarely came here, and the arrival of a schooner off the town was an event of the greatest importance. There were no roads and scarcely any travel. A weekly mail on horseback was first received from Niles, Mich., in 1832; a one-horse wagon succeeded in 1833, followed in 1834 by a four-horse stage line, and a daily mail in 1837. Scarcely any domestic improvements of a durable character were attempted, except dwelling-houses, although the Lake House, and two or three other substantial brick-blocks,

and several warehouses date at this period. The harbor was commenced in 1833, and the first work done on the canal on the 4th of July, 1836. In 1833, the Chicago Democrat, and in 1835, the Chicago American, two weekly newspapers, were started. The School Section, one mile square of valuable land, within the City limits, was sold about this time for some $40,000. In the winter of 1836–7, the legislature passed the act incorporating the City.

In 1837, speculation having run its career, the bubble burst, and brought ruin to thousands who had become identified with it and risked their all upon its chances. It was a severe calamity to Chicago. Without capital; without a currency, with undeveloped resources; without trade; the dissipation of this fatal illusion, left her citizens nothing but a mountain of indebtedness; and the lands for which it had been incurred, now worse than valueless. Everything remained stationary until about 1840, when times had improved; population had come in; farms had been opened in the country; trade had revived; and especially by the wise interposition of law, the fetters were removed from business men, and enterprise permitted to act untrammeled for the advancement of private interest, and the welfare of the community. The condition of things during this period would have been more deplorable than they were but for the partial benefit derived from the Canal, which was in progress of construction, and the Harbor, upon which several appropriations were expended.

About 1840, Chicago experienced the first healthy growth and real, substantial prosperity; not, however, so strikingly perceptible previous to 1843, as the four years following. From 1843 to the present time, the place has advanced with a rapidity unexampled in the history of cities. Capital, to some extent, has been introduced; the country is generally settled; the soil has been brought to furnish productions for export; real estate, both lots and lands, has become valuable; our citizens, many of them, have become wealthy; and population and trade, both export and import, have, during the

short period of four years, more than doubled—very nearly trebled. * * *

Trade *and* Commerce.

For several years after the commencement of the place, provisions for domestic consumption were imported from the East, as well as goods and merchandise. Exports previous to 1839–40, were merely nominal. A small cargo of beef was shipped in 1833, and was followed each successive year by a small consignment of the same article and pork; but not a bushel of our great staple, wheat, was shipped previous to 1839"

That Chicago was at low ebb so far as the business is concerned, appears from the following extract from Andreas' History of Chicago:[57]

"* * * From 1832 to 1838 the incoming settlers consumed nearly all the products of those who had come before them. Those who had raised crops in 1833 found a ready market for their surplus among the comers of 1834, who, in turn, found an equally urgent demand for their products in the increasing throng of emigrants of the succeeding year. The early trade and traffic in furs, or the correlative barter of goods in exchange for them, could hardly be classed even as the beginning of Chicago commerce. The Factory of Chicago and the agents of the American Fur Company show in their records all that will ever be known of early Chicago Commerce. The vast commerce of the city today has no connection with it whatever. The Indian trade was virtually extinct before the American commerce which now centers at Chicago had begun"

It has been pointed out above that estimates of Chicago's early population are of very doubtful accuracy, but nevertheless we shall refer to a few of them. In 1830, Chicago had 70 or 100 inhabitants,[58] or possibly no more than 45 or 50.[59]

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[57] Wisconsin Exhibit 69, p. 14.
[58] Wisconsin Exhibit 96, p. 4.
[59] Wisconsin Exhibit 86, p. 2.

In 1833, the population was about a hundred.[60] In 1834, it had come to be a village of perhaps 800. In 1835, a school census showed the population to be 3,279, and in 1836 the number of inhabitants was estimated to vary from 3,500 to 4,000.[61] Between 1836 and 1840 there was not much growth, and we find the population estimated at 5,000 in the latter year.[62]

We turn, now, to the matter of industries, and learn that in 1830 the one manufacturing industry of Chicago was the slaughtering of cattle and hogs to supply fresh meat for the garrison and villagers[63] and that in 1833 the only industries in Chicago were one tannery and one sawmill.[64] In the year 1836, the following industrial situation prevailed, according to the answers to a newspaper questionnaire of that time:[65]

> " 'Question—What are its public buildings, its schools and its manufacturies?
>
> 'Answer—Its public buildings are one Episcopal church of brick; one brick banking house, the Chicago Branch of the State Bank at Springfield; one brick Courthouse or Clerk's office; one Jail; and a small Postoffice. There is one Baptist church of brick in the progress of building; one Presbyterian church of stone, about to be put under contract. There are two select schools, and three or four district or common schools, supported out of an ample school fund, granted to the State by the general government. 18 Of manufacturies, there is one foundry, a steam grist mill, a steam sawmill, a brewery, and a soap and candle factory.
>
> 'Question—When was it settled?
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> 'Answer—The town is very young. It may be said to have been settled in 1832, after the Sac or Black Hawk

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[60] Wisconsin Exhibit 98.
[61] Wisconsin Exhibit 69, p. 5.
[62] Wisconsin Exhibit 98.
[63] Wisconsin Exhibit 84, p. 1; Wisconsin Exhibit 96, p. 4.
[64] Wisconsin Exhibit 69, p. 4.
[65] Wisconsin Exhibit 82.

war. Since the Sac war, Chicago has risen with wonderful rapidity, and the wild Indian trading post is this winter applying for its Mayor and Aldermen.

* * *

'Question—Where do your merchants purchase their goods, chiefly, and by what route or conveyance do they receive them?

'Answer—The merchants purchase their goods chiefly in New York; the remainder principally comes from Boston and Philadelphia. They come from New York by the Hudson river, the Erie canal, and the lake' "

The source of these statements guarantees that they are not unduly conservative.

Another report concerning the year 1836 contains the following:[66]

"In 1835, the number of buildings was very small. Now they amount to upwards of 1000, more than thirty of which are brick. There are about 100 mercantile firms, and lawyers, physicians, and mechanics in due proportion. In the department of manufactures are found a steam sash factory, a steam flour mill, a wind mill, and paper factory. There is a company chartered, for supplying the City with water, two newspaper and job printing offices, and one job and book printing office, one engraver, one bookbinder, one dyer, and, in short, every sort of trade, from the master builder down to the dealer in second-hand clothing.

The increase of commerce may be judged of from the fact, that in 1833, there were only four arrivals of vessels, whose aggregate burthen was only 700 tons, while in 1836, there were 456 arrivals of vessels, whose aggregate burthen amounted to 60,000 tons"

The first export from Chicago of which we have record, aside from furs, was a load of barreled beef and hides which was sent to the East in 1833.[67]

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[66] Wisconsin Exhibit 98.

[67] Wisconsin Exhibit 97. Wisconsin Exhibit 84, p. 3.

This was followed each year by a small shipment of beef and pork.[68] The first shipment of grain from Chicago was made in the year 1836 or 1838, and consisted of but 78 bushels.[69] The first substantial shipment of wheat did not take place until 1839.[70]

The first organized company to engage in the freight business to and from Chicago was the Erie Line, which in 1835 delivered the first freight landed in Chicago by any commercial organization.[71]

Until the year 1839, Chicago and vicinity were dependent upon the east and principally upon Ohio, for the necessities of life—flour, corn, pork and beans.[72]

We have pointed out previously that in 1832 and 1833 there was no harbor at Chicago. In the latter year the first harbor appropriation was made by Congress, in the sum of $25,000.[73] The pier which was to be built with that appropriation was not yet finished in 1837, and harbor conditions were still very bad as late as 1843, notwithstanding that continual demands for further appropriations were made upon Congress throughout the period.[74]

One of the great speculative enterprises of the day was the Chicago Canal which was to connect Lake Michigan with the Illinois River and the Mississippi valley. Work upon this canal was commenced in 1836.[75]

Prior to 1833, Chicago had been dependent for lumber upon the native woods, although the supply was meager and the quality poor. In 1833, one Carver began to bring lumber from the Michigan pineries near St. Joseph, across the lake,

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[68] Wisconsin Exhibit 84, p. 3.
[69] Wisconsin Exhibit 81; Wisconsin Exhibit 97, p. 2.
[70] Wisconsin Exhibit 84, p. 3.
[71] Wisconsin Exhibit 81, pp. 1–2.
[72] Wisconsin Exhibit 69, p. 1.
[73] Wisconsin Exhibit 69, p. 5.
[74] Wisconsin Exhibit 69, pp. 5–9.
[75] Wisconsin Exhibit 84, p. 2.

but the total receipts of lumber in Chicago in that year were estimated at the almost negligible quantity of 30,000 feet.[76]

In 1836 the imports of Chicago were $325,203, according to one report, and $904,851 according to another. The exports in that year were but $1,000 in value.[77] In 1839, the imports amounted to $586,581 and the exports $33,843. The following year the imports were $891,357 and the exports $229,484.[78] These figures show two significant facts (1) that throughout these years the imports of the locality far exceeded its exports, because of the large immigration from the East and the inadequacy of local agriculture and industry to supply the demands of the growing population, and (2) that the exports, which were probably the true measure of the commercial importance of the port, did not assume any large proportions until 1840, when there was a tremendous gain over the preceding year.

Chicago was made a government port of entry in 1846[79] and in 1847 her tonnage exceeded that of Mackinac.[80]

Between 1842 and 1847, the leading articles of export from Chicago were wheat, flour, beef, pork and wool.[81]

### Milwaukee.

We turn now to a brief consideration of the early development of Milwaukee, for the purpose of showing that in and prior to 1836 there could not have been any material amount of commerce between that point and Green Bay.

Milwaukee was founded, in one sense of the word, by Solomon Juneau, who settled there in 1818 and opened a small

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[76] Wisconsin Exhibit 84, p. 3.
[77] Wisconsin Exhibit 84, p. 3; Wisconsin Exhibit 325.
[78] Wisconsin Exhibit 325. A complete table of the value of imports and exports for the years 1836 to 1840, inclusive, appears on p. 228 of this brief.
[79] Wisconsin Exhibit 69, p. 13.
[80] Wisconsin Exhibit 326.
[81] Wisconsin Exhibit 327, p. 4.

trading post. Until 1835, however, Juneau was the only settler.[82] In that year other people began to arrive, and Milwaukee was laid out as a town,[83] its population, however, consisting of no more than ten persons. In the following year there were 400 people, and in 1840 a population of 1712.[84]

The first year for which figures regarding the imports and exports of the city are available is 1836, when the imports aggregated $588,950 in value and the exports $26,145.[85] It is apparent that Milwaukee was growing rapidly at that time.

Milwaukee harbor was surveyed in 1834, but no appropriation was made for it until 1843, and as late as 1847 there was no good harbor between Chicago and Mackinac in which vessels could obtain shelter in storms.[86] Milwaukee was made a port of entry in 1850.[87]

It appears from the above evidence that while Milwaukee grew rapidly after it got a start, that start did not come until 1836, and during the time which Congress had in mind when referring to the most usual ship channel there was but one family at Milwaukee, and necessarily a negligible amount of shipping.

**Other Lake Michigan ports.**

The ports on the western shore of Lake Michigan which sprang up at about the same time as Chicago and Milwaukee were Racine, Kenosha and Sheboygan. In 1834 none of these places were in existence. The condition of the country at that time is portrayed as follows by Mr. Holand:[88]

> "In 1818 Solomon Juneau settled at the mouth of the Milwaukee River and opened a little trading post for the

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[82] Michigan Exhibit 128, p. 22.
[83] Wisconsin Exhibit 68.
[84] Wisconsin Exhibit 84, pp. 1, 2, 4.
[85] Wisconsin Exhibit 325.
[86] Wisconsin Exhibit 77, pp. 1, 3; Wisconsin Exhibit 67, pp. 5–6.
[87] Wisconsin Exhibit 327, p. 3.
[88] Michigan Exhibit 128, p. 22.

> Indians. For seventeen years he was not only the only settler at what later became Milwaukee but he was also the only one on the entire Lake Michigan shore. From Chicago to Death's Door and south to Green Bay the shore lay dark and mysterious, uninhabited by a single fisherman, farmer or fur trader. Back from the shore the forest stretched in unbroken majesty, haunted only by the wild beasts and savage red men of the wilderness —a country as little known then as some obscure spot of Africa is now"

In 1835 there were but three houses or at most three small groups of houses between Chicago and Milwaukee.[89]

**Racine and Kenosha**

Racine and Kenosha were founded in 1834 or '35, according to the account given by Mr. Riley.[90] The first cargo of lumber came to Kenosha in 1835, having been shipped from the site of the present city of Sheboygan.[91]

The imports and exports of Racine and Sheboygan for the year 1836 and following years are given in Wisconsin Exhibit 325. In 1836 the imports of Racine aggregated $52,835 in value, and her exports $225. The imports of Sheboygan amounted to $11,000 and her exports $13,128.

In 1840, the population of Racine was 337 and the population of Kenosha was exactly the same.[92] No figures as to the population of Sheboygan appear in the record.

The first harbor appropriations for Racine and Kenosha were made in 1844, but as late as 1847 there was no respectable harbor between Chicago and Mackinac.[93]

We submit that the evidence in the record shows that conditions in Racine, Kenosha and Sheboygan were some-

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[89] Wisconsin Exhibit 69, p. 4.
[90] Wisconsin Exhibit 84, p. 2.
[91] Wisconsin Exhibit 84, p. 2.
[92] Wisconsin Exhibit 84, p. 4.
[93] Wisconsin Exhibit 77, p. 3; Wisconsin Exhibit 67, pp. 5–6.

what similar to those in Chicago and Milwaukee, that is, the towns were established about 1834 or 1835 and had a relatively rapid growth thereafter, but at no time before the passage of the Michigan Enabling Act were they commercial ports of sufficient magnitude to have engaged in a material amount of trade with the Green Bay ports.

**Summary**

In the preceding pages we have tried to show that for many years prior to 1836 Mackinac and the locality where the present city of Green Bay stands were well known, important and very busy commercial centers, with a large trade constantly being carried on between them by the water route. Chicago, Milwaukee and other western Lake Michigan ports did not commence to assume importance until about 1835, and prior to that time the shore of the lake was, so far as commerce is concerned, an unbroken wilderness. The trade between these Lake Michigan ports and Green Bay must in the nature of things have been but a "drop in the bucket" compared to the flourishing commerce between the latter and Mackinac. Hence, on the assumption that prior to 1836 as well as in later years Lake Michigan shipping passed through Death's Door and Mackinac boats used the Rock Island passage, the latter must have been immeasurably the most usual ship channel until after the passage of the Michigan enabling act.

2. THE MACKINAC–GREEN BAY ROUTE WAS A LINK IN ONE OF THE GREAT TRADE HIGHWAYS FROM THE EAST TO THE UPPER MISSISSIPPI COUNTRY.

We believe that this proposition is a matter of common knowledge and that it requires but little support in the way of evidence. We shall point out a few parts of the record which bear on the matter, however, because the proposition seems to us important as further proof that there was much

commerce between Mackinac and Green Bay, and that therefore the Rock Island passage was a very usual one.

The general geographical situation is described in the record as follows:[94]

> "Fox river rises in Columbia county, Wis., and empties into Lake Winnebago, which is about 35 miles long and 15 miles wide. From Lake Winnebago it flows northward into Green Bay, an arm of Lake Michigan.
>
> At Portage City the Fox river is separated from the Wisconsin river by a distance of only two miles, and these two rivers were the early route from the Great Lakes to the Mississippi river. From Portage City to Lake Winnebago the distance is 110 miles, and the fall is about 30 feet; from Lake Winnebago to Green Bay the distance is 35 miles and the fall is 170 feet. * * *"

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[94] Michigan Exhibit 124, p. 12. Of interest in this connection is the following extract from Samuel Stambaugh's official report to the Secretary of War, in 1831:

> "The distance from Green Bay to Prairie du chene, by way of Fox and Wisconsin rivers, upon which the merchandise destined for the Prairie and Fort Winnebago is transported, is about four hundred miles. But by the path travelled by horsemen, the distance is not above two hundred and thirty miles. The distance from the Bay to Fort Winnebago, at the Wisconsin portage, by this path, is about one hundred and ten miles, travelling nearly S. W. course. There is a portage of about a mile and a quarter in length between the Fox and Wisconsin Rivers. From Green Bay settle—to *Mineral Point*, by way of Wisconsin portage, which is the only road now travelled, the distance is about one hundred and ninety miles, and form Mineral Point to Galena it is thirty six miles. A little assistance from the Government to aid in improving the Fox river below Winnebago Lake and upon a road from the head of the Lake to the mining country, is alone required not only to shorten the distance of the routes, and facilitate transportation, but to reduce the price of it at least one-half below the present rates" (Michigan Exhibit 150, pp. 3–4).

Miss Deborah B. Martin sums up the geographical importance of Green Bay thus, in her History of Brown County:[95]

> "Green Bay * * guards the gate of the waterway which connects the St. Lawrence valley with that of the Mississippi, and is a central shipping point for coal and grain."

In a study entitled "The Fur Trade in Wisconsin," it is stated that the Mackinac–Green Bay–Fox–Wisconsin route was, in the fur-trading days, one of the six principal routes from the Great Lakes to the upper Mississippi valley.[96]

In our discussion of the early history of Green Bay we have pointed out that the majority of the most eminent early French travelers passed through Green Bay on their way from the East to the Mississippi.[97] These explorers naturally followed the line of least resistance, and the course taken by them is significant as being the natural route for early commerce. In this connection, it is interesting to notice the map of Jonathan Carver's expedition of 1766, which shows by dotted line the course taken by Carver into Green Bay, up the Fox River, and down the Wisconsin into the Mississippi.[98]

Another evidence of the fact that the Green Bay–Fox–Wisconsin route was the natural one to the upper Mississippi is found in Wisconsin Exhibit 64, an account of the travels of one E. Bressette, an active and enterprising business man of the '30s. The account quaintly describes two trips to the Mississippi, which were made via the Fox and Wisconsin Rivers.[99] Later on, it appears that Bressette engaged in the business of building boats to ply between

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[95] Michigan Exhibit 57, p. 1.
[96] Wisconsin Exhibit 312.
[97] Pp. 190–191, this brief.
[98] Michigan Exhibit 96.
[99] Wisconsin Exhibit 64, pp. 2–3.

Green Bay and Fort Winnebago, which was at the portage from the Fox to the Wisconsin River. Still later, about 1834 or 1835, Bressette built a hotel on Lake Winnebago, on the Fox River route, and reference is made to a road which the United States government was building from Navarino (Green Bay) to Fort Winnebago.[1]

As we have already pointed out in another connection, the lead trade between southwestern Wisconsin and the East by way of the Great Lakes was very voluminous, 10,000,000 pounds having been shipped in 1829. As early as 1827, there were from 1500 to 5,000 persons engaged in working the lead mines, and it appears that the major part of the lead was exported by way of Green Bay.[2]

In 1833, one of the arguments advanced for making Green Bay the capital of the proposed territory of Wisconsin was its central location. The principal settlements in the proposed territory were those in the southwestern part thereof, those near Green Bay, and Mackinac. Green Bay was located on the trade route between these points and was pictured as a commercial center of much importance See the letter from Alexander I. Irwin to Lucius Lyon, dated December 12, 1833.[3]

As late as 1851, Green Bay was considered to be on the principal route from the East to the upper Mississippi valley.[4]

Another evidence of the importance which was attached to the Green Bay–Fox River–Wisconsin River waterway is the great and continuous agitation in the early days for the improvement of the waterway by means of locks, a canal

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[1] Wisconsin Exhibit 64, p. 6.
[2] Wisconsin Exhibit 309, p. 2.
[3] Michigan Exhibit 103.
[4] Wisconsin Exhibit 327, a communication from the Secretary of the Treasury to the Senate.

at the portage, etc. The "Fox River Improvement" was a very live issue and active enterprise for many years.[5]

### 3. Actual Figures Indicating Amount of Shipping.

There are in the record a considerable number of statistical accounts giving actual figures as to the imports, exports, customs' receipts, vessel arrivals, etc. of Green Bay, Mackinac and Chicago. These figures are in no sense complete and can at best but give a partial picture of the situation, yet we shall refer to them briefly, for they appear to us to bear out a proposition which we have endeavored at length to prove, to-wit, that at and prior to the time when Congress referred to "the most usual ship channel into Green Bay" both Mackinac and Green Bay were more important ports than Chicago, and hence there must have been more shipping between the two than between Green Bay and Chicago.

#### Customs receipts.

Until the middle '40s, Mackinac was the only one of the three towns which was a port of entry having a customs house, hence the only figures in the record relative to customs receipts refer to that port. We find that as early as 1804 the duties paid to the government at the port of Mackinac were about $60,000[6] and the receipts for the first eight months of the following year were about $40,000.[7] These sums are immense when it is remembered that Mackinac was at the edge of the wilderness. Plainly it was the great commercial center of the Northwest.

As late as 1847 the registered tonnage of the port of

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[5] See, for instance, Wisconsin Exhibit 327 and the map Wisconsin Exhibit 164, dated 1853, a part of which is printed in the supplement as Figure 21.

[6] Wisconsin Exhibit 315, p. 1.

[7] Wisconsin Exhibit 313.

Mackinac was 1288-75/95th, as against 3951-56/95th, for Chicago.[8]

**Value of imports and exports.**

We have already pointed out the evidence in the record indicating the general importance of Mackinac, and have shown that until the '40's it was the busiest port on the lakes, and for many years an annual total of $3,000,000 worth of goods were exchanged for furs at that place.[9]

The record shows that as early as 1754, $18,000 worth of goods were shipped to Green Bay for the Indian trade;[10] that in 1815 trading stock worth $15,000 was shipped there for the establishment of a single enterprise;[11] and that in 1821, the American Fur Company sent to its own traders at Green Bay goods of the value of $15,000.[12] About 1831, 1500 barrels of flour were brought to Green Bay annually from Ohio, not including that used by the garrison of the port and for the Indian department.[13]

Referring to exports, there is in the record but one estimate of the value of those of Green Bay's prior to 1836.[14] The exports from the Green Bay region in the year 1829 are said to have been 10,000,000 pounds of lead, $300,000 worth of furs and peltries, 800 to 1000 barrels of white fish, and 200,000 pounds of maple sugar.[15]

Turning now to Chicago, we find no estimates in terms of dollars, volume or weight, of any exports from that locality until 1836, with one exception. The first export from Chicago, excepting furs, peltry and hides, was a consignment of 287

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[8] Wisconsin Exhibit 326.
[9] Wisconsin Exhibits 311, 315, 317.
[10] Wisconsin Exhibit 312, p. 2.
[11] Michigan Exhibits 140, 141.
[12] Wisconsin Exhibit 312, p. 3.
[13] Wisconsin Exhibit 94, p. 2.
[14] Michigan Exhibit 57, pp. 10-12.
[15] Michigan Exhibit 57, pp. 11-12.

barrels of beef, 14 barrels of tallow, 2 barrels of beeswax and 152 hides, shipped to Detroit in 1833.[16] The first grain shipment was made in 1836 or 1838 and amounted to but 78 bushels.[17]

The first bit of freight landed in Chicago by any organized company was delivered in 1835 by the Erie Line, from the East.[18]

The record discloses presumably accurate figures for the imports and exports of Green Bay, Chicago, Milwaukee, Racine and Sheboygan, from 1836 to 1840. We quote in full the table which appears as Wisconsin Exhibit 325:[19]

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[16] Wisconsin Exhibit 97, p. 1; Wisconsin Exhibit 84, p. 3.
[17] Wisconsin Exhibit 81; Wisconsin Exhibit 97, p. 2.
[18] Wisconsin Exhibit 81.
[19] Wisconsin Exhibit 325. This table is taken from Senate Document No. 1, 28th Congress, First Session.

**Consolidated statement of the moneyed value of the trade of the Lakes.**

| PORT | 1836 | | 1837 | | 1838 | |
|---|---|---|---|---|---|---|
| | Im-ports | Ex-ports | Im-ports | Ex-ports | Im-ports | Ex-ports |
| Lake Mich. Sheboygan | 11,000 | 13,128 | 12,000 | 20,150 | 4,000 | 12,158 |
| Racine | 52,835 | 225 | 49,895 | 1,000 | 28,340 | 1,400 |
| Chicago | 904,851 | 1,000 | 373,672 | 11,000 | 578,174 | 16,000 |
| Milwaukee | 588,950 | 26,145 | 641,235 | 47,745 | 783,458 | 47,690 |
| Green Bay | 392,291 | 56,660 | 352,649 | 109,980 | 395,345 | 72,265 |

| PORT | 1839 | | 1840 | |
|---|---|---|---|---|
| | Imports | Exports | Imports | Exports |
| Lake Mich. Sheboygan | 2,200 | 16,050 | 650 | 13,518 |
| Racine | 52,920 | 2,000 | 59,944 | 5,750 |
| Chicago | 586,581 | 33,843 | 891,357 | 229,484 |
| Milwaukee | 866,740 | 43,568 | 1,147,803 | 53,828 |
| Green Bay | 258,791 | 121,126 | 248,819 | 148,943 |

Attention is called to one apparent discrepancy in the record: The table above quoted shows the imports for Chicago for 1836 to have been $904,851, while Mr. Riley's historical sketch of the development of Chicago gives the imports for 1836 as $325,203.[20] We do not know which figure is correct.

[20] Wisconsin Exhibit 84 p. 3.

but the smaller seems more compatible with the rest of the table.

Sketchy as the above estimates and statistics of commerce are, they show plainly enough that the exports from the port of Green Bay were greater than those of Chicago until 1840, which was the first year of a really phenomenal growth of business from the latter port. The imports of Green Bay were also much greater than those of Chicago until 1835 at least, and we find them not greatly surpassed by those of Chicago until 1838, with the exception of the year 1836, when there is some uncertainty about the amount of Chicago's imports. The commerce of the port of Milwaukee had a development somewhat similar to that of Chicago, while that of Racine and Kenosha was consistently small during the time under discussion.

### Vessel arrivals.

Another index to the commercial importance of Green Bay and Chicago in the early days may be found in evidence concerning the number of vessels which visited those ports. There are a good many statements and figures on this subject.

Considering Green Bay first, we find that as early as 1816, four relatively large sailing vessels visited that port, bringing United States troops.[21] In 1821 the "Walk-in-the-Water," the first steamboat on the Great Lakes, steamed to Green Bay.[22] In 1826, it was stated that vessels were entering and leaving Green Bay almost every week in the spring, summer and autumn months.[23] That year the steamer "Henry Clay" made a trip to Green Bay, and another in 1827.[24] From 1827 to 1832 there were annual passenger excursions made to Green Bay by two or three

[21] Michigan Exhibit 57, pp. 3, 4.
[22] Michigan Exhibit 57, pp. 6, 7.
[23] Wisconsin Exhibit 85.
[24] Wisconsin Exhibit 91, p. 1; Wisconsin Exhibit 66.

steamboats at a time.[25] In 1830 the "Henry Clay" again visited Green Bay.[26] In 1832 a single steamer entered the port, and again in 1833 there was but one trip made by a steamboat, while in 1834 there were two steamer trips to Green Bay.[27] The map appearing as Michigan Exhibit 85, dated 1832, shows that as early as that year the route from Detroit to Green Bay was a recognized steamship route.[28] In 1835 there are recorded thirty-eight arrivals of vessels in Fox River, eight of them being steamships.[29] In 1840 a steamer plied regularly between Buffalo and Green Bay.[30]

The above cited statements of arrivals refer principally to steamboats, for those are the only ships about which the historians seem to make much mention. The fact that some steamboats came to Green Bay is strong evidence that an infinitely greater number of sail ships entered that port. This must have been the case, for of 456 vessel arrivals recorded in Chicago in 1836, 407 were sailing vessels and 49 steamships—a ratio of about eight to one.[31] A year or two later there were operating on Lakes Erie, Michigan and Superior, 225 sailing vessels and 61 steamers, the ratio being about four to one.[32]

We turn now to Chicago, and find it stated that for an indefinite period after 1804 but two or three vessels per

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[25] Michigan Exhibit 124, pp. 4, 5. See, also, Wisconsin Exhibit 91, p. 1.

[26] Wisconsin Exhibit 95, pp. 1, 2.

[27] Wisconsin Exhibits 75, p. 3; 87, p. 1; 74.

[28] See the right hand margin of the map. See, also, p. 178 of this brief.

[29] Michigan Exhibit 57, p. 17.

[30] Wisconsin Exhibit 87, p. 2.

[31] Wisconsin Exhibit 69, p. 5.

[32] Wisconsin 90, p. 3. As we have already pointed out the inhabitants of the region now known as Wisconsin were solely dependent for most of the necessities of life, including flour and other provisions, upon shipments brought by water from the East (Wisconsin Exhibit 71, p. 5).

year landed there.[33] No steamship visited Chicago until 1832, when two of them came there with General Scott's troops for service in the Black Hawk War.[34] In 1833 there were four arrivals in Chicago, having an aggregate tonnage of 700. Two of these were steamboats[35]. In 1834, there were 178 arrivals, having a tonnage of 5,000. Three of these were steamers. The number of arrivals is accounted for chiefly by the fact that three small schooners plied back and forth between Chicago and St. Joseph, on the east side of Lake Michigan, thus registering many arrivals in each port.[36] In the following year, the number of arrivals was 250, and the tonnage 22,500.[37] In 1836, we find 456 arrivals recorded, having an aggregate tonnage of 57,550.[38] Of these 49 were steamers and 407 sailing vessels.[39] In 1839, eight regular steamers plied between Chicago and the lower lakes[40] and in 1840 there were eight regular steamers between Chicago and Buffalo[41].

Thus it was not until 1834 at the earliest, and perhaps not until a year or two thereafter, that the vessels visiting Chicago equalled in number those which entered Green Bay.

Although there were regular steamers between Chicago and Buffalo and between Green Bay and Buffalo, there was apparently none between Chicago and Green Bay, for as late as 1841, we read of a small steamer which ran from

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[33] Michigan Exhibit 124, p. 2.
[34] Wisconsin Exhibits 67, p. 7; 74; 86, p. 1; 91.
[35] Wisconsin Exhibits 69, p. 5; 84, p. 3; 98; 74; 87, p. 1.
[36] Wisconsin Exhibits 92, 74 and 87, p. 1.
[37] Wisconsin Exhibits 84, p. 3; 92.
[38] Wisconsin Exhibits 84, p. 3; 92 and 98.
[39] Wisconsin Exhibit 69, p. 5.
[40] Michigan Exhibit 124, p. 6.
[41] Wisconsin Exhibits 87, p. 2; 90, p. 2.

Green Bay to Mackinac in order to connect with the daily line from Buffalo to Chicago.[42]

A STUDY OF CHARACTER OF THE EXPORTS AND IMPORTS OF CHICAGO AND GREEN BAY SHOWS THAT THERE COULD NOT HAVE BEEN MUCH INTERCHANGE OF COMMERCE BETWEEN THOSE POINTS.

We shall first consider the evidence concerning the character of the exports and imports of Green Bay.

For many years the primary article of trade was, of course, the furs exported from the region and manufactured goods imported to exchange to the Indians for them. This proposition is obvious and needs no citation of evidence.[43]

In 1826 the principal exports of the region were peltries, fish, maple sugar and lead.[44] The same articles were the principal exports in 1829.[45] In 1831 fish was especially mentioned as an important article of export from the waters of the bay.[46]

We have no direct and inclusive statement of what Green Bay's imports were, aside from the manufactured goods which were brought there to trade to the Indians. The record discloses, however, that in 1831 the flour used by the inhabitants was brought in from Ohio,[47] and that the white population was wholly dependent upon the east for most of the necessities of life.[48] As late as 1840 it is said that

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[42] Wisconsin Exhibit 76.

[43] Regarding the magnitude of the fur trade in 1836, see Wisconsin Exhibits 83 and 312, p. 3.

[44] Wisconsin Exhibit 85.

[45] Michigan Exhibit 57, pp. 10–12.

[46] Wisconsin Exhibit 94, p. 2.

[47] Wisconsin Exhibit 94, pp.1–2.

[48] Wisconsin Exhibit 71, p. 5

the people of Wisconsin territory imported their supplies of every kind, including provisions.[49]

Referring now to Chicago, we observe that in 1830 the only industry of the town was the butchering of cattle and hogs for food for the inhabitants,[50] and in 1833 the industries of the town were but two—a tannery and a sawmill.[51] In 1836 the locality boasted a foundary, a grist mill, a saw mill, a brewery and a soap and candle factory.[52] The first export of Chicago was a small shipment of beef, beeswax and hides, in 1833.[53] Small shipments of beef and pork were made each year after 1833 but they must have been almost negligible, because they are not mentioned in more than one of the numerous accounts of Chicago's early commercial development which are found in the record.[54] Exportation was in these early years practically at a standstill, for the Indian trade was dead and the industrial and agricultural products of Chicago were consumed there by the rapidly growing population.[55] The first wheat was not shipped from Chicago until 1836 or 1838, when a shipment of 78 bushels was made.[56] The first grain shipment of material size was made in 1839.[57] The principal exports from Chicago for the years 1842–47 are listed as being wheat, flour, beef, pork and wool.[58]

What the imports of Chicago were we can only guess. It is stated in Andreas' History of Chicago that until 1839 the military post and the surrounding country to the distance

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[49] Wisconsin Exhibit 88.
[50] Wisconsin Exhibit 84, p. 1.
[51] Wisconsin Exhibit 69, p. 4.
[52] Wisconsin Exhibit 82.
[53] Wisconsin Exhibits 84, p. 3; 97.
[54] Wisconsin Exhibit 84, p. 3.
[55] Wisconsin Exhibit 69, p. 14.
[56] Wisconsin Exhibits 81, p. 1; 97, p. 2.
[57] Wisconsin Exhibits 84, p. 3; 97, p. 2
[58] Wisconsin Exhibit 327, p. 4

of 100 miles were supplied with the necessities of life—flour, corn, pork, beans, etc,—from the East, principally from Ohio.[59]

While our survey of the imports and exports of the two localities cannot be complete, we nevertheless feel that it gives a fair picture of commercial conditions as they must have been. We do not believe that the things which Green Bay exported were those which Chicago needed, nor that those which Chicago exported were those which Green Bay needed. We have seen that both communities got their foodstuffs and their manufactured goods from the East, with the exception of the small quantities of food raised in their own localities. What Green Bay had to sell was principally furs, fish, maple sugar and lead.

Chicago obviously could supply her own furs, fish, and maple sugar, and we find no reference to any industries requiring lead. Chicago had practically nothing to sell in and prior to 1836 but furs and hides, and of these products Green Bay had a sufficiency of her own. The one shipment of beef which is recorded prior to 1837 went East and not to Green Bay.[60]

### The Lumber Trade

We believe that we have shown beyond peradventure that prior to 1836 there was not and could not have been more than a nominal amount of trade between Green Bay and the southern Lake Michigan ports, and that therefore but very little use was made of the Death's Door Channel. We should let the matter stand without further attention were it no for the fact that Michigan has offered a large amount of testimony and documentary evidence that there has long been a very extensive lumber trade between

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[59] Wisconsin Exhibit 69, p. 1.
[60] Wisconsin Exhibit 97.

Green Bay ports and Chicago and that the lumber boats plying between those regions take the Death's Door passage. We concede the truth of the proposition which Michigan has so elaborately sought to establish, and dispute only the inference which is drawn therefrom, to-wit, that this condition existed on and the prior to the date of the establishment of the boundary. Because of the extent to which Michigan appears to urge this inference, we shall direct attention to some evidence establishing that the lumber trade thus relied upon did not commence until after 1836, and that accordingly Michigan's evidence showing the extent of the trade and the course taken by it in subsequent years is wholly irrevelant to the question of what was the most usual channel in and before 1836.

We submit that the evidence in the record shows (1) that lumber was not exported from the waters of Green Bay in material quantities until after 1836, and (2) that Chicago got her lumber from other regions until after that year.

We have already seen that a small saw mill was built near Green Bay in 1809;[61] that another was erected on the Fox River in 1820 by the United States government;[62] that Judge Arndt built a very small mill on the Pensaukee, near Oconto, in 1825;[63] that the first mill on the Menominee River was built in 1832, and the second one not until 1840;[64] that the first mill at Oconto of which we have record was built between 1836 and 1840, but was soon destroyed and was rebuilt in 1847;[65] and that other primitive mills at Oconto were erected about 1841.[66] Thus we observe that only a very few of the

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[61] Wisconsin Exhibit 73.
[62] Michigan Exhibit 57, p. 5.
[63] Wisconsin Exhibit 93, p. 2.
[64] Wisconsin Exhibit 93, p. 1.
[65] Wisconsin Exhibit 94, p. 2.
[66] Michigan Exhibit 57, pp. 18–19.

saw mills of which we have record were even in existence prior to 1836. We have direct evidence of the commencement of their export business, for we find it stated in Miss Martin's History of Brown County that the first cargo of lumber ever exported from Green Bay was shipped by Judge Arndt in 1834.[67] It does not appear where it was sent.

In the same book we find the following statement attributed to one B. F. Smith:

> "The writer located at De Pere in the autumn of 1851, and found employment at once in the lumber business. Previous to that date there had been only a few small mills to supply the local demand.[68]

The late Special Counsel for the State of Michigan in this suit had the following to say concerning the early history of the lumber business:[69]

> "Prior to 1850 very little was done in the way of lumbering in the Upper Peninsula, and for very good reasons, either of several of which is sufficient. In the first place, settlement of the adjacent states was so little advanced that they made slight demand for lumber, and, next, transportation facilities were inadequate, but, perhaps the best reason is found in the fact that until the government land surveys had been completed and the lands put upon the market there was no way to obtain title to the timber lands. This last mentioned obstacle being removed close to the half century mark, the decade from 1850 to 1860 saw large purchases of timber lands, and the construction of numerous mills."

In 1837 no public surveys had been made on the west side of Green Bay.[70] In 1841 the surveys south of the Menominee

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[67] Michigan Exhibit 57, p. 15.

[68] Michigan Exhibit 57, p. 15.

[69] Wisconsin Exhibit 79, p. 2.

[70] See the official map prepared by the Surveyor General. Wisconsin Exhibit 182.

River were confined to a narrow strip along the Bay, and as late as 1842, there had been no government surveys of public lands on the west side of the Bay north of the Menominee River.[71] These facts support Mr. Sawyer's above quoted conclusion that the lumbering business did not get a good start until the middle '40s at the earliest.

The mere presence of saw mills does not mean that lumber was exported in quantity. In this connection, we quote the following from the report of David Dale Owen, dated 1849, which gives apparently careful figures relative to the lumber business in the Green Bay region:[72]

> "The lumber of Wolf River, of Lake Winnebago, and of Fox River, is all consumed at the numerous villages on those waters, springing up with hot-bed rapidity. None of it is shipped, but on the contrary, boards are brought into Fox River from mills down the Bay; so that, probably, not more than one-third of the lumber produced is taken out of the Bay of the Lake towns, or 11,000,000 feet."

11,000,000 feet of lumber is not a very large quantity, commercially speaking. Note that even this total was not reached until 1848 or 1849, nearly thirteen years after the designation of the boundary.

The best and most complete history of the lumber industry which we have been able to find is that published by George W. Hotchkiss in 1898. We quote one of Mr. Hotchkiss's authoritative conclusions:[73]

> "The upper peninsula of Michigan did not, to any great extent, come into prominence until the decade of 1860–70, although certain localities favorably situated had attracted attention for some years previous."

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[71] Michigan Exhibits 44 and 45.
[72] Wisconsin Exhibit 80, p. 2.
[73] Wisconsin Exhibit 93, p. 1.

In support of the above statements, we refer to the testimony of one of Michigan's own witnesses, Mr. William McDonald, who was born on Washington Island in 1865, and whose father came there before 1850. Mr. McDonald testified from his own observation that in the '60s not many boats came for lumber, and that the lumber trade developed later.[74]

Thus it appears that the Green Bay region was not exporting lumber in appreciable quantities in 1836 or prior thereto. We turn now to the consideration of Chicago's lumber imports.

We find it stated in E. A. Riley's commercial history that up to 1830 there was no saw mill in Chicago and not a single schooner of lumber had come there.[75] Mr. Hotchkiss, the authoritative historian of the lumber industry, states that the first lumber from outside the vicinity was brought to Chicago in 1833.[76] The early timber used in Chicago came from the immediate neighborhood.[77]

The first frame building built at Chicago was erected in 1832, of timber brought from the Calumet River, a few miles distant.[78] Between the years 1832 and 1834, several saw mills were built in Chicago to saw the native timber.[79]

An early settler of Chicago states that most of the timber used there about 1834 came from the immediate vicinity or else was imported from Canada. He further states that as late as 1837 sawed lumber was so scarce and so expensive in Chicago that he found it cheaper to buy land ten miles out of the village, cut the timber, haul it to town, and shape it there, than to buy sawed lumber.[80]

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[74] R. p. 354.
[75] Wisconsin Exhibit 84, p. 1.
[76] Wisconsin Exhibit 93, p. 5.
[77] Wisconsin Exhibit 93, p. 3.
[78] Wisconsin Exhibit 93, p. 3.
[79] Wisconsin Exhibit 93, pp. 4–5.
[80] Wisconsin Exhibit 99, p. 1.

Chicago's first lumber merchant was one David Carver, who arrived in 1833. He owned a schooner called "The David Carver," with which he began to ply between Chicago and St. Joseph, on the east shore of Lake Michigan, carrying lumber from the pineries at the latter place.[81] Riley, the historian of Chicago's commercial development, makes the following observation in connection with Carver's venture:[82]

> "It was but natural that Chicago's first lumber should come from there, since Michigan was settled earlier than Wisconsin and its forests were even more easily reached. The total receipts of lumber in Chicago in 1833 are estimated at only 30,000 feet."

In 1834 two small schooners were engaged in the lumber trade from St. Joseph to Chicago[83] and a considerable amount of lumber was thus imported in 1835.[84]

It seems pretty clear from the exhibits above mentioned that Chicago was getting her lumber from the immediate vicinity and from St. Joseph, until after 1836. There are in the record several careful studies of the early development of the lumber trade of Chicago, and it is significant that there is not a single mention of any receipt of lumber from Wisconsin prior to 1837. The first lumber trade between Green Bay and Chicago of which we find mention is thus noticed by Hotchkiss:[85]

> "About this time [between 1833 and 1837] a few small mills were being erected on the shores of Green Bay, Wis., and in the course of a year or two began to send small cargoes of lumber to Chicago, so that by 1839 the lumber trade began to assume proportions of considerable magnitude."

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[81] Wisconsin Exhibit 84, p. 3.
[82] Wisconsin Exhibit 84, p. 3.
[83] Wisconsin Exhibit 87, p. 1.
[84] Wisconsin Exhibit 69, pp. 15–16.
[85] Wisconsin Exhibit 93, p. 5.

It is perhaps worth while to observe here that when the newly established town of Kenosha needed lumber, in 1835, she got it not from Green Bay, but from Sheboygan.[86]

This concludes our survey of the lumber trade. We submit that it speaks for itself and shows conclusively that the extensive trade between the waters of Green Bay and Chicago, which is made so much of by Michigan, did not commence until a considerable time after the period which is material to the present controversy.

### Ships in Use in 1836

We now invite the Court's attention to two facts about which there can hardly be any dispute—(1) that in and prior to 1836 the vast bulk of the shipping was carried on by means of sailing vessels, and (2) that sailing vessels require a wider channel than do steamships, because of the necessity of tacking when running against the wind. We have already shown that the Rock Island passage is much wider than Death's Door and must have been much easier for sailing vessels to navigate with adverse winds. It follows that the Rock Island passage was probably the one customarily used.

The fact that sailing vessels were the ones principally used in and prior to 1836 is doubtless a matter of common knowledge of which the Court will take judicial notice, but there is some evidence in the record proving the proposition.

In 1830 provisions and supplies were brought to Green Bay from the East in small sailing vessels, of from 25 to 50 tons' capacity.[87]

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[86] Wisconsin Exhibit 84, p. 2.

[87] We quote the following from Henry S. Baird's Recollections, Wisconsin Exhibit 71, p. 5:

> "The commerce of the country was carried on through the medium of a few sail vessels plying between this place and the ports on Lake Erie. These vessels were generally of from twenty-five to seventy tons burthen. Occasionally, perhaps

In 1833, there were but eleven steamships on the entire Great Lakes, and as late as 1845 there were but fifty-two steamers.[88] Of the 456 vessels which arrived in Chicago in the year 1836, 407 were sailing vessels and only 49 were steamships. Of the sailing vessels, 363 of them averaged about 100 tons each.[89] In the same year the tonnage of the largest steamship operating out of Detroit was 472 tons.[90]

In Wisconsin Exhibit 90 appears a statement showing the number of steam boats operating on Lakes Erie, Michigan and Superior, some time between the years 1837 and 1840, and also the number of "ships, brigs and schooners" at the same time. There were 61 steamers and 225 sailing vessels, and the average tonnage of the steamers was slightly less than 300, that of the sailing vessels being about 80 tons.[91]

It is obvious that such small vessels did not draw much water, and hence the St. Martin's Island Shoal, which lies between Rock Island and St. Martin's Island and reduces the width of what is now known as the Rock Island passage, could not have been much of an obstacle in the early days. St. Martin's Shoal has a depth of fifteen feet,[92] and the depth of the other shoal near it is indicated by its name, i. e., Nine Foot Shoal.[93] There is evidence in the record that a vessel drawing nine feet of water was considered a large one even as late as the '50s, and that the average good sized lumber boat drew from six to nine feet of water.[94]

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once or twice in the season of navigation, a steamer from Buffalo would look in upon us; but these were far different in structure and capacity from the splendid 'floating palaces' which have visited our waters in later years."

[88] Wisconsin Exhibit 77, p. 1.

[89] Wisconsin Exhibit 69, p. 5.

[90] Wisconsin Exhibit 89, p 1.

[91] Wisconsin Exhibit 90, p. 3.

[92] See the testimony of Lawrence Martin, R. p. 742.

[93] See any chart.

[94] See the testimony of Michigan's witness Lyon, R. pp. 107–108.

Captain Frank Root, one of Michigan's witnesses, testified that in the '60's there were only about half a dozen steam boats plying in the waters of Green Bay, as against hundreds of sailing vessels.[95] Michigan's witness James F. Lyon testified that in the early days of his recollection (the years immediately after 1853) between 95 and 99 per cent of the vessels in the bay were sailing vessels.[96]

The fact that sailing vessels require a wide channel, because of the necessity of tacking against adverse winds, is another fact of which the court will undoubtedly take judicial notice. The record is not destitute of evidence on the point, however, for the requirement of a wide channel for tacking purposes is brought out at several places.[97]

## UNDERSTANDING OF CONGRESS.

So far, in connection with the Green Bay boundary, we have been considering only the question of what actually was the most usual ship channel in the year 1836. We shall now give brief consideration to the question of what Congress itself probably meant by the words "most usual ship channel."

We refer first to the content and legislative history of the bills which were before Congress in 1836 in connection with the Michigan-Wisconsin boundary question. The general history of these bills was given at length by Wisconsin's witness Martin.[98]

The first of the bills to be introduced was that known as S. 92, introduced by Senator Clayton, Chairman of the Senate Committee on Judiciary, on Janury 21, 1836, and providing for the establishment of a territorial government for Wisconsin. This bill was amended, and finally became a law on

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[95] R. p. 77.
[96] R. pp. 107, 109.
[97] R. pp. 35, 101, 103.
[98] R. pp. 664–679; 687–688, 690; 734–737.

April 20, 1836. As originally introduced, the part of the boundary description rereferring to the Green Bay region read as follows:[59]

> "Thence on the north, following the *ship channel* into Green Bay, to the mouth of the Menomonie River."[1]

Note the absence of any designation of which ship channel was meant.

On March 25 S. 92 was amended by striking out the whole bill after the enacting clause and inserting an entirely new set of provisions, of which the material part of the boundary description was as follows:[2]

> "Through the middle of Lake Michigan to a point in the middle of said lake, and opposite the *main channel* of Green Bay, and through said channel and Green Bay to the mouth of the Menomonie River"[3]

Note the insertion of the word "main" and the dropping of the word "ship" as a designation of the channel. In this form the bill was passed and became a law.

While the Wisconsin Territorial Bill was pending, both the Senate and the House had before them measures providing for the admission of the State of Michigan. That question was before the House in the form of a resolution, House Resolution 382. This proposal never became law, for the reason that the contemporaneous Senate bill served the same purpose and was passed. The House resolution is material, however, because of the description of the boundary which it contained. The Green Bay section of the boundary was described in the resolution as follows:[4]

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[59] R. pp. 665–666.
[1] Italics ours.
[2] R. p. 666.
[3] Italics ours.
[4] R. p. 688.

"Thence through the middle of the *main channel* of Green Bay, to the middle of Lake Michigan"[5]

Note the use of the adjective "main."

The Senate bill which finally became the Michigan Enabling Act was introduced on March 22, 1836, as Bill S. 177. This bill became law without material amendment on June 15, 1836.[6] In it the boundary was described exactly as it now appars in the Michigan Enabling Act, to-wit, it was designated as being "the center of the *most usual ship channel.*"[7]

Thus we see that in three bills which were before Congress at the same time and which dealt with the same boundary, two of them used the words "main channel," and the third the words "most usual ship channel." Inasmuch as one bill using the words "main channel" was passed very shortly before the enactment of the Michigan Enabling Act, the conclusion seems inescapable that Congress used the terms "main channel" and "most usual ship channel" interchangeably, with no thought of differentiation. The bills were in committee at almost exactly the same time, and there is nothing in them or in the congressional debates to indicate the slightest intention on the part of Congress to distinguish between the meaning of the different boundary descriptions. Indeed, it is inconceivable that Congress would create a Territory of Wisconsin in the month of April with one boundary, and then in the month of June of the same year create the State of Michigan with a different common boundary.

It appears, therefore, that when Congress referred to the most usual ship channel, it meant the main channel, and vice versa.

Throughout the period when the boundaries were being created by Congress, Lucius Lyon, former Michigan terri-

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[5] Italics ours.
[6] R. pp. 664–665.
[7] Italics ours.

torial delegate and, at the time under discussion, Senator-designate from the prospective State of Michigan, was in Washington taking an active part in the negotiations for the admission of Michigan, and was in constant touch with the congressional situation. Lyon was at the same time in continual communication with various of his constitutents in Michigan. Therefore his letters relative to the proposed boundary of Michigan are important as showing his understanding, and that of the people of Michigan, relative to the boundary of the proposed state.

Wisconsin Exhibit 332 contains extracts from a number of letters written by Lyon to his constituents at this time. In the Exhibit there is quoted part of a letter to Colonel Andrew Mack of Detroit, dated February 21, 1836, in which Lyon says:[8]

> "I have no doubt the Committee will recommend that our western boundary be so altered as to run down Lake Michigan to the Fox Islands, thence along the *main ship canal* into Green Bay, and up the Bay to the mouth of the Menominee River."[9]

On the same date, Lyon addressed a letter to Charles C. Hascall, a member of the Michigan Senate, referring to the proposed boundary as "through the middle of the *main ship canal* into Green Bay, thence through the bay to the mouth of the Menominee River."[10] It appears clearly from these letters that Michigan's official representative had the same understanding as Congress, to-wit, that the *main* channel should be the boundary.

The importance of the fact that both Congress and Michigan's principal lobbyist considered the boundary to be the main channel is made apparent by a glance at the

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[8] Wisconsin Exhibit 332, p. 3. See, also, R. p. 673.

[9] Italics ours.

[10] Wisconsin Exhibits 332, p. 4; 305; R. p. 674. Italics are ours.

profile of the islands and channels of the Grand Traverse, which is printed in the supplement[11] and by a reference to the matter set forth on pages 167–168 of this brief in explanation thereof. Even if there were any question which channel was the most usual one, there could be no doubt whatever as to which is the main channel. The Rock Island passage is so much wider, deeper, straighter and safer that it is idle to contend that it is not the main channel.[12] Such being the case, it is the channel which Congress referred to as "the most usual ship channel", and is the boundary.

As we have seen elsewhere, the United States government in 1840 sent Captain Cram to survey the boundary. Cram's instructions were given him by Colonel J. J. Abert, Chief of the Bureau of Topographical Engineers, on July 30, 1840. We quote the following from those instructions:[13]

> "The usual ship channel of Green Bay, is presumed to be the best, as such would be the one generally resorted to. The expression, however, clearly implies the existence of more than one channel, and the necessity, in consequence of surveying the whole of Green Bay, in order to determine which of its ship channels is the best."

In his first report, dated December, 1840, Captain Cram adopts the same construction of the boundary description suggested by Colonel Abert, viz., that by the words "most usual ship channel" Congress meant the best ship channel.[14] As elsewhere stated, Cram recommended a survey to determine which channel was the best, but in his report of the following year, after he had made additional observations in the field, he did not renew his recommenda-

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[11] Supplement, Figure 29.
[12] See pp. 167–174 of this brief.
[13] Michigan Exhibit 14, p. 2.
[14] Michigan Exhibit 15, pp. 8–9.

tion, but, on the contrary, submitted a map of the boundary which clearly shows Washington Island in Wisconsin, and indicates that Cram had made up his mind that the Rock Island passage was the best and most usual channel.[15]

Neither the Wisconsin Enabling Act of 1846 and the Congressional proceedings in connection therewith[16] nor the act admitting Wisconsin as a State[17] throw any light upon the understanding of Congress as to the meaning of the boundary description.

**The Indian Treaty of 1836.**

There is in the record another piece of evidence which is, in our opinion, very significant. On March 28, 1836, a treaty was concluded at the City of Washington between the United States government, represented by Henry R. Schoolcraft of Michigan, and the Ottawa and Chippewa nations of Indians, represented by their chiefs.[18] By it, the Indians ceded to the United States a large tract of land in what is now northern Michigan. The boundaries of the tract were set forth in the treaty. A part of the boundary was described as follows:

> "Article first. The Ottawa and Chippewa nations of Indians cede to the United States all the tract of country within the following boundaries, * * * thence, in a direct line to the head of the Skonawba river of Green Bay, thence, down the south bank of said river to its mouth, thence, in a direct line, *through the ship channel into Green Bay* to the outer part thereof, thence south * * *."[19]

We now call the Court's attention to Wisconsin Exhibit 170, p. 1, which is a map of the lands ceded to the United States

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[15] Michigan Exhibit 23. See especially the map attached thereto, a part of which is reproduced opposite p. 163 of this brief.

[16] 9 Stats. at L. 7; Wisconsin Exhibits 36 and 306.

[17] 9 Stats. at L. 233.

[18] This treaty is quoted in part in Wisconsin Exhibit 329.

[19] Wisconsin Exhibit 329, p. 1. The italics are ours.

by the various Indian tribes.[20] The tract of land enclosed by a white line and designated by the number "42" is the tract ceded by the Ottawas and Chippewas by the treaty of March 28, 1836, to which we have already referred, and from which we have quoted.[21] The white line enclosing the tract thus ceded passes from Green Bay into Lake Michigan immediately north of Rock Island, through what is unmistakably the Rock Island passage. In short, the persons who officially interpreted the Treaty of 1836 considered the Rock Island passage to be the "ship channel into Green Bay" referred to in the treaty.

The map to which we refer was compiled in 1839 by the Bureau of Topographical Engineers, in compliance with a resolution of the United States.[22] It is undoubtedly an official map, exhibiting the official interpretation of the treaty. The material part of the map is reproduced in the supplement to this brief, as Figure 23.

The treaty and the map are discussed in some detail in the testimony of Colonel Lawrence Martin, chief of the Map Division of the Library of Congress, and a recognized geographical authority. We print Colonel Martin's testimony on this point in the margin, for the purposes of making clear the significance of the map above mentioned.[23]

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[20] The character of the map is shown by the matter on pp. 2 and 3 of the exhibit.

[21] Wisconsin Exhibit 170, pp. 2 and 3.

[22] Wisconsin Exhibit 170, p. 2.

[23] We quote the following from pp. 713–717 of the record:

MR. RIESER: I ask you now to refer to Wisconsin Exhibit 170, and ask you to state what that is?

A Wisconsin Exhibit 170 is a set of three photostat sheets showing a part of a map in the Library of Congress indicating boundaries of the lands ceded by Indians to the Federal Government.

Q Of what date?

A 1839.

Q I call your attention to a white line leading north of

We feel that it requires no argument to show the great significance of the fact that the United States government in

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Rock Island and then striking the main line of the Upper Peninsula north of Green Bay, and ask you if you know what Indian Treaty that refers to?

A I do.

Q Will you state what it is?

A The line shown on the first of these three sheets as extending from Lake Michigan into Green Bay immediately northeast of the island designated as 'Rock Island' is also indicated on the same sheet as related to the treaty designated with the number '42', and also that designated with the number '46'.

The second sheet of this exhibit indicates that '42' was the treaty between the Ottawas and Chippewas, a treaty negotiated at Washington on March 28, 1836.

The second sheet of this map indicates, by its title, that it was made in the Bureau of Topographical Engineers of the War Department, in accordance with a resolution of the United States Senate.

The manuscript notes upon the same, indicate the sources of certain materials used; the manuscript notes being dated July 1851 and signed 'J. J. A.', for J. J. Abert, Chief of the Bureau of Topographical Engineers.

I testified that Wisconsin Exhibit 170 consisted of three photostat sheets and constituted only a part of the map which is in the Library of Congress. The part of the map which is omitted carries the title and date of the original map upon which the boundaries of the lands ceded by Indian treaties were designated, and that original map is a map of the United States of America, by H. S. Tanner, published in 1839.

The white line alluded to as crossing from Lake Michigan into Green Bay just north of Rock Island is the green line on the original manuscript map in the files of the Library of Congress.

The conditions under which this map was prepared indicate, by the statement in the United States Statutes at Large, Volume V, at page 328, that on March 3, 1839, the President approved an appropriation including a provision 'to enable the Secretary of War to have executed under his direction twelve maps for the use of the War Department and of the

1839 officially interpreted the words "ship channel into Green Bay" in the Treaty of March 28, 1836, as requiring a boun-

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Senate, showing the position of the lands of each Indian tribe in amity with the United States.'

There was an appropriation for $1000.00. The identity of this map with the one provided for in the statute of March 3, 1839, is suggested by the presence of the words on the map 'Compiled------ in compliance with a Resolution of U. S. Senate 1839', and of the words referring to 'the position of the Lands occupied by Indian Tribes in amity with the United States.'

It therefore appears that this map was prepared for the use of the War Department and of the United States Senate. The Treaty, referred to on page 2 of Exhibit 170, as having been negotiated at Washington, on March 28, 1836, appears in Volume 7 of the United States Statutes at Large, at page 491. That Treaty includes the description of the boundary of the Indian lands ceded to the United States by the Ottawa and Chippewa nations of Indians, in the following language: 'Thence, in a direct line to the head of the Shonawba river of Green Bay, thence down the south bank of said river to its mouth, thence, in a direct line, through the ship channel into Green bay, to the outer part thereof, thence south', etc.

Q And that treaty appears now as Defendant's Exhibit 329, does it?

A Yes sir. The treaty was ratified by the United States Senate and proclaimed by the President on May 27, 1836. The treaty alluded to with the Ottawa and Chippewa Indians as having been signed at Washington on March 28, 1836, was signed just one day before the Senate passed the Bill establishing the Territorial Government of Wisconsin, which the Journal of the Senate shows was passed on March 29, 1836.

MR. SAWYER: Speaking again of Exhibit 170, and referring to your testimony that the original map is a copy of the Tanner map, I ask you from the characteristics of Defendant's Exhibit 170, you can determine whether that's a copy of the Tanner map of 1839 or the Burr map of 1836?

A The map upon which the 1836 Treaty is drawn is a map by H. S. Tanner, but not the map we have previously discussed, as it is a map of the whole United States of America.

Q And under date of 1839?

A Yes. The representation of the drainage along a por-

dary through the Rock Island passage. The treaty was almost contemporaneous with the Michigan Enabling Act, and the making of the map was but three years thereafter.

## CHAMBERS ISLAND.

Wisconsin makes substantially the same argument with respect to Chambers Island as was advanced in connection with Washington and Rock Islands. The same boundary description governs in each case and the same kind of evidence has been adduced to support the claims of the parties. The evidence with respect to Chambers Island is much less voluminous than that regarding the other islands.

**Direct evidence of what was most usual ship channel in 1836.**

The principal piece of evidence under this head is the statement of Lieutenant Pendergrast in his official report

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tion of the Wisconsin-Michigan boundary near the Lake of the Desert is apparently identical with that shown upon the Burr map of March 11, 1836, except that this Tanner map of 1839 designates several bodies of water as Lakes of the Desert, while the Burr map designates these bodies of water as 'Les Lac Vieux Desert'.

MR. SAWYER: Speaking of the line heretofore referred to on Exhibit 170 as coming from Lake Michigan into Green Bay, I ask you what treaty controls as to line from the Westerly, and will you read the language of the treaty in regard thereto?

A The map indicates by the number '50' what treaty was referred to. The table reads under number '50', the treaty signed at Washington under date of Feb. 8, 1831, Vol. 7, U. S. Statutes at Large, page 342, indicates that the treaty signed at Washington on Feb. 8, 1831, was a treaty with the Menominee Indians. The boundary shown upon Exhibit 170 is described in this treaty as follows, beginning with the mouth of the Milwaukee river, 'thence north, along the shore of lake Michigan, to the mouth of Green Bay; thence up Green Bay, Fox river, and Winnebago lake, to the place of beginning' ''

to the Board of Navy Commissioners, made in the year 1837, in which he refers to Chambers Island thus:[1]

> "*Chambers island.*—This island is exactly in the track of vessels, and as there are shoals, reefs, and small islands, scattered about in all directions near it, I am persuaded a light at this place would be of great utility."

A glance at any map will show that Chambers Island is not directly in the path of vessels following the shore of the peninsula, and that Pendergrast could have referred only to vessels sailing west of the island. This is strong evidence that the usual channel in 1837 was the western passage. A light on Chambers Island would be of no utility to vessels using Strawberry Channel, for, as every chart shows, it would simply direct them into reefs and rocks.[2]

Pendergrast's statement is supported by Michigan Exhibit 85, which is a map of the year 1832, on the margin of which is a list of prominent points on the steamboat route from Detroit to Fort Howard.[3] Chambers Island and Green Island are both included in the list, indicating that they were important landmarks, if not stopping places, on the route. Any map will show that a vessel using Strawberry Channel would not naturally observe Green Island as an important landmark, nor could it conveniently stop at Chambers Island.

**Character of channels.**

We advert to evidence of the character of the channels in the Chamber Island region because of the natural inference that the best, safest, widest, deepest and straightest channel must have been the main and most usual channel in 1836 as at present.

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[1] Wisconsin Exhibit 52, p. 10.
[2] See for instance Michigan Exhibit 115.
[3] See testimony of Col. Martin, R. p. 705–706.

The best map of the region which appears in the record is Michigan Exhibit 115, a chart prepared by the Corps of Engineers of the War Department. Chambers Island is shown about six inches from the top of the map and about midway between its sides. The Strawberry Islands, to which frequent reference will be made, are between Chambers Island and the Door County peninsula to the east thereof, being somewhat closer to the peninsula than to the island. Shoal water is shown in blue, and its depth given in terms of feet. Deeper water is shown in white, and the figures thereon indicate depth in fathoms.

It is the claim of Wisconsin that the boundary runs from the mouth of the Menominee River to the west and northwest of Chambers Island, following approximately the dotted line on the map. Michigan claims that the boundary proceeds almost straight east from the mouth of the Menominee River until it intersects the dotted line close to Door County peninsula, and that it then approximately follows said dotted line through what is marked as the Strawberry Channel.

It appears from the most casual glance at the chart that the passage to the west of Chambers Island is a great deal wider and deeper than that to the east. Colonel Lawrence Martin testified that the distance as shown by the map (Michigan Exhibit 115) from the point designated as Rock-a-wash, immediately northeast of the Strawberry Islands, to the Eagle Bluff light on the main shore opposite that point, is about 1⅛ miles; that the distance between the 6½ foot shoal, immediately above the letter "H" of the word "channel" in the words "Strawberry Channel", to the point just below the mainland, was about three-eighths of a mile; and that the distance from the Chambers Island light, on the northwest corner of the island to the Michigan mainland to the west thereof, is 6⅝ miles.[4] It thus appears that

[4] R. pp. 659–660.

the maximum width of the channel claimed by Michigan as the boundary is about 1/6th of the width of the channel claimed by Wisconsin, and that the minimum width of the channel claimed by Michigan is about 1/18th thereof.

A glance at the map above referred to, Michigan Exhibit 115, makes it apparent not only that Michigan is claiming as her boundary a channel very much narrower than that claimed by Wisconsin, but that the easterly channel is crooked where the westerly one is straight, and is shallow where the westerly one is deep. The chart shows that the Strawberry Channel is in several places as little as 14 or 15 feet deep, whereas the channel west of Chambers Island is consistently of a depth of from 13 to 18 fathoms, or from about 80 to 110 feet. In other words, the channel which Wisconsin claims to have been the main and most usual one is about six times as deep as that claimed by Michigan.

Colonel Martin, who is, as we have previously pointed out, a well known authority on geographical subjects, further testified as follows:[5]

> "Q. Referring to the Wisconsin Territorial Act and the language used with reference to the boundary line in Green Bay as being the main channel, in your opinion can the Strawberry Passage be considered to be a main channel?
>
> MR. SAWYER: Objected to as incompetent, irrelevant and immaterial.
>
> A. No sir."

Figure 31 of the supplement to this brief is a profile of a section across Green Bay, passing through Chambers and Strawberry Islands, and is similar in interpretation to Figure 29, the profile of the Grand Traverse explained

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[5] R. pp. 742-743.

heretofore.[6] The Chambers Island profile is based on Michigan Exhibit 115, and the line followed by the profile is shown in heavy black on the photograph of part of the exhibit printed as Figure 32 of the supplement. Michigan Exhibit 115 does not have any contour lines to indicate the topography of the land areas, and hence no claim is made that the profile of Chambers Island and Strawberry Island is correct. The profile of the channels between the islands and on either side of them is based on soundings shown on the map, and is therefore quite accurate.

A glance at the profile will be sufficient to show how preposterous it is to claim that the Strawberry Channel shown at the extreme right of the profile is or was ever the main channel.

We quote the following extract from Barnet's Coast Pilot for the year 1872:[7]

> "Chambers' Island light, fixed, varied by flashes every minute, visible 15 miles, on the northwest end of the island, Green Bay. A guide through the western passage (5½ miles wide) between the island and the main. A reef extends off the north point of the island 1½ miles. *Strangers should not pass to the eastward of this island, or between it and the Strawberries.* Whale's Back Shoal, NE½N 14 miles; Point Rochereau, NNW¾W 7 miles; Menomonee, SWby W 13 miles.
>
> Green Island light, fixed, on keeper's dwelling, white, visible 15 miles, on the SE point of the island, off Menomonee, near Green Bay. Reefs extend off from the SE and NW points of this island a half and 1 mile, respectively. The best channel (6 miles wide) is to the eastward of this island. The NW end of Chambers' Island bears NEby N½N 11 miles. The SE point of Peshtigo Shoal SWby S 8 miles; Sturgeon Bay, SbyE¾E 11 miles"[8]

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[6] Pp. 167–168 of this brief.
[7] Wisconsin Exhibit 369.
[8] Italics ours.

It appears clearly from this Exhibit that the eastern passages were considered dangerous at that time, and that the best channel was that between Green Island and Chambers Island. It cannot be argued that the statement that the best channel is to the eastward of Green Island refers to the Strawberry passage, for, while the latter is east of Green Island, the reference to the bearing of the northwest end of Chambers Island shows plainly that the guide refers to the channel west of Chambers Island.

We shall advert now to some descriptions of the channels which appear in the testimony.

Captain C. O. Pederson, a Michigan witness who commenced sailing on the Bay in 1870, testified that the Strawberry passage is so narrow that the navigators of his day never went that way; that "they wouldn't tackle in there."[9]

Michigan's witness William Betts, who came to the Bay in 1855, and sailed and tended light house in the vicinity of Washington Island for a great many years thereafter, testified that there was no room in the channels east of Chambers Island for the larger vessels; that the passage was narrow and full of reefs; that there is a "bunch of rocks" right in the middle of the passage abreast of Fish Creek, and that large boats "would not risk it to try the Strawberry passage."[10]

Jacob Young, a Michigan witness who had lived in the vicinity since 1865 and had done much navigating as a fisherman, testified that the lumber barges would not run through the Strawberry Channel because "it was too dangerous; they couldn't come through there," and that there was in the Strawberry Channel "too much shoal water."[11]

Captain Frank D. Root, an old lake boat master who had been familiar with the waters of Green Bay since 1868, testi-

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[9] R. p. 11.
[10] R. pp. 35–37.
[11] R. p. 51.

fied that it was impossible to go through the Strawberry Channel at night prior to the time the lights were put there, and that "a man that did not know that channel couldn't go through there."[12] He further testified that even after the light was put in the Strawberry passage, it was not as safe as the passage west of Chambers Island; that a big boat could not go through and that "it was generally crooked in there."[13]

Michigan's witness James F. Lyon, who had lived on Green Bay since 1853, stated that there was no room for tacking in the Strawberry passage, and that therefore large boats would prefer the channel west of Chambers Island.[14] Mr. Lyon considered that a boat drawing nine feet of water was a "good size vessel."[15]

**Lighthouses.**

There is evidence in the record that the first lighthouse to be built in the vicinity was placed on Green Island at least as early as 1853.[16] Green Island is well on the west side of the Bay, near the mouth of the Menominee River, and entirely out of the course taken by vessels using Strawberry Channel. The light so early placed there could be of but little importance to vessels using the eastern passage, and therefore must have been established for the protection of those sailing west of Chambers Island.

The present Chambers Island light was built in 1868, on the northwest side of the island.[17] It will be recalled that Lieu-

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[12] R. pp. 73–74.

[13] R. p. 80.

[14] R. pp. 101–103.

[15] R. pp. 107–108.

[16] See Farmer's map of 1853, which appears in the Record as Wisconsin Exhibit 172 and shows a light in existence on Green Island.

[17] Wisconsin Exhibit 100, p. 2; see also the testimony of Jacob Young, R. p. 51.

tenant Pendergrast had recommended a light on this island as early as 1837, stating that the island was directly in the path of vessels.[18] The location of the light on the northwest side of the island makes it clear that it was erected for the protection of ships passing west of the island, for its only effect on those heading for Strawberry Channel would be to guide them into rocks and reefs.[19]

So far as we are aware, it does not appear in the record when the present light in the Strawberry Channel was established, but the testimony of Michigan's witness Captain Root shows that the west passage was lighted before Strawberry Channel.[20] Michigan's witness Pederson stated that in the early days of his experience there was not even a can buoy in the latter passage.[21] The Eagle Bluff light is said to have been erected in 1868.[22]

It is significant that Chambers Island light was established prior to that in Strawberry Channel and contemporaneously that on Eagle Bluff, for the Strawberry passage is much narrower, shallower, more crooked and more treacherous than the channel west of Chambers Island, and hence would have been the natural one to illuminate first, had there been sufficient traffic to warrant the expenditure.

### Course taken by vessels subsequent to 1850.

As we pointed out in connection with the other islands, there is in the record a very large amount of evidence regarding the channel used by ships within the memory of persons now living, which evidence was introduced principally by

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[18] Wisconsin Exhibit 52, p. 10.

[19] Any chart will show this. See, for instance, Michigan Exhibit 115.

[20] R. pp. 73–74.

[21] R. p. 11.

[22] Michigan Exhibit 128, p. 32.

Michigan, over the objection of Wisconsin. We regard such evidence as irrelevant to the question of what was the most usual ship channel in 1836. We are entirely willing, however, to meet Michigan on her own ground, and hence we shall discuss this class of evidence to some extent for the purpose of pointing out that, while it is conflicting, a great deal of it shows that the channel west of Chambers Island always has been the most usual channel.

We first call attention to three Wisconsin exhibits.

Wisconsin Exhibit 164 is a map of the route of the Fox and Wisconsin Rivers' Improvement, dated 1853. It shows in a heavy dotted line the route taken by traffic to and from the waters of Green Bay. The course thus indicated passes to the west of Chambers Island, and no course is shown to the east thereof.[23]

Wisconsin Exhibit 166 is a map published in the year 1865 by Disturnell, a prolific publisher of maps and travelers' guides. This map indicates the steamship route by a dotted line, running west of Chambers Island.[24]

Wisconsin Exhibit 72 consists of the chapter on Green Bay taken from Thompson's Coast Pilot of 1865. On page 1 of the exhibit is given what appears to be the principal route from Point Waugoshance (in Lake Michigan) to the City of Green Bay. This route is described as passing to the west of Chambers Island. The same exhibit also includes a description of the route from Washington Island to Long Tail Point (near Green Bay city), which passes through the Strawberry Channel, but the secondary position given to the description of this route indicates that it was not considered by the author to be the principal one.

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[23] The material part of this map is reproduced in the supplement as Figure 21.

[24] The material part of this map is reproduced in the supplement as Figure 22.

We turn now to a consideration of the oral testimony offered by Michigan.

Captain C. O. Pederson, who sailed in this region since 1870, testified that a vessel coming to the villages at the head of Green Bay would go west of Chambers Island, and would do the same in going in the opposite direction;[25] and that in the early days "we didn't take that passage (Strawberry); it was so narrow we never went that way."[26] Steamboats took the same course "not through Strawberries; they wouldn't tackle in there.[27] The witness would not travel in the Strawberry Channel "except I was going to Fish Creek or Ephraim."[28] Referring to the passage west of Chambers Island, he stated "they all went that way. That was the way we learned to go."[29] The old-time sailors who taught him the course instructed him to take the west channel.[30]

William Betts, who first sailed in Green Bay in 1855 and did considerable sailing after that, and for many years was a light house keeper, testified that all of the larger boats in his day went west of Chambers Island, because there was no room in the Strawberry Channel for the larger vessels. "In case they met a heavy wind in that passage they couldn't maneuver to any advantage, naturally, a big vessel in a narrow passage full of reefs."[31] The Strawberry Channel would be considered quite dangerous in rough weather.[32] The small propellers from Buffalo to Green Bay used the Strawberry passage because they engaged in trade at the little villages along the peninsula, but the large boats would not go through

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[25] R. p. 11.
[26] R. p. 11.
[27] R. p. 11.
[28] R. p. 12. Fish Creek and Ephraim are villages on the east shore of Green Bay.
[29] R. p. 13.
[30] R. p. 14.
[31] R. p. 35.
[32] R. p. 36.

there.[33] Large boats "would not risk it to try the Strawberry passage."[34] Practically all of the boats that took the Strawberry passage had some business to transact at Fish Creek or other points on the peninsula.[35]

Jacob Young, a fisherman and light house keeper since 1865, testified that boats going to or from Menominee went to the west of Chambers Island,[36] while boats out of Green Bay came through Strawberry passage.[37] The principal traffic with the ports on the peninsula in the early days was wood; there was nothing more.[38]

Martin Knudson, who had lived on Washington Island most of the time since 1866, and had been at various times a fisherman and lighthouse keeper, stated that "the early boats always took the one (channel) west of Chambers Island."[39]

Captain Frank D. Root, a navigator who had been familiar with the waters of Green Bay since 1868, testified that boats running from Green Bay to Lake Michigan would generally go to the west of Chambers Island;[40] that the Buffalo boats went through Strawberry Channel to get wood, but that aside from them "all steamboats and outside boats, they all went through west of Chambers Island. There was very few steamboats in those days."[41] He further testified that "all lumber boats all went to the westward, and the Goodrich boats and Buffalo boats traded to the eastward."[42] Going to Oconto, it was the universal practice for sail boats to go west of Chambers Island, because "Strawberry passage wasn't lit at all; there

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[33] R. p. 37.
[34] R. p. 37.
[35] R. pp. 38–39.
[36] R. p. 49.
[37] R. p. 49.
[38] R. p. 52.
[39] R. p. 58–59.
[40] R. p. 68.
[41] R. p. 69.
[42] R. p. 70.

was no lights, or any stakes, or anything at all going through there them days; and if we come in through the other there was a light on Chambers Island, and another light on Peshtigo Shoals."[43] The boats that took the Strawberry Channel took it principally for the purpose of getting wood, but they had to go through there in daylight, for it was impossible to get through the Strawberry Channel at night.[44]

James F. Lyon came to Menominee in 1853, and has nearly always lived on Green Bay. He gave it as his recollection that the larger vessels all went on the west side of Chambers Island, there being no room for tacking in the Strawberry passage.[45] There was not room enough in the Strawberry channel for a large vessel to make a long enough leg, and hence such boats would prefer to go west of Chambers Island.[46] The witness often sailed through Strawberry Channel, but it was for the purpose of trading with the little towns on the Peninsula.[47] Vessels carrying over 175,000 feet of lumber would rarely go through Strawberry Channel.[48] Mr. Lyon explained that a vessel drawing nine feet of water would carry 250,000 feet of lumber, and would be considered "a good size vessel," while the earlier lumber boats drew from six to nine feet of water.[49]

James K. Allger, who came to Washington Island in 1846 and lived on the shores of Green Bay since that time, testified that Menominee boats went west of Chambers Island[50] while the Strawberry passage was used most by other vessels.[51]

Louis Dobeas, who lived in Fish Creek as a boy in the '50s,

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[43] R. p. 73.
[44] R. p. 73.
[45] R. p. 101.
[46] R. p. 103.
[47] R. p. 103.
[48] R. p. 104.
[49] R. pp. 107–108.
[50] R. p. 127.
[51] R. pp. 127, 132.

testified that he remembered seeing sail boats come through the Strawberry passage[52], and that the Buffalo boats stopped at Fish Creek, and hence came through that channel.[53]

Mary Ann Cota, an old Indian woman whose husband was a sailor, told of various trips which her husband or other persons had made through the Strawberry passage.[54] The witness was not well versed in the English language and her testimony was extracted from her by a liberal use of leading and suggestive questions, as is apparent upon reading the testimony. Taken at face value, it proves nothing but that in various particular instances vessels had used the Strawberry passage—a fact which is freely conceded.

Dave Cota, a half-breed Indian who was born in 1877, testified that his Indian grandfather preferred Strawberry Channel to the other ones.[55] This testimony was duly objected to as hearsay.

William McDonald, who was born on Washington Island in 1859 and had been a fisherman since he was ten years old, testified at length to the fact that his father usually took the Strawberry channel;[56] that he himself did the same;[57] that his father told him that the early boats took the Strawberry passage;[58] that fishermen followed it;[59] that Buffalo boats used it;[60] that Goodrich boats also did so;[61] and that the reason the Strawberry passage was preferred was because of the good harbors along the shore on that side.[62]

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[52] R. pp. 133–134.
[53] R. p. 137.
[54] R. pp. 284–297.
[55] R. pp. 306–307.
[56] R. p. 327.
[57] R. p. 328.
[58] R. p. 329.
[59] R. pp. 332, 339.
[60] R. pp. 333–334.
[61] R. p. 351.
[62] R. p. 346.

Alfred Henes testified to a considerable experience in the operation of small pleasure boats, and stated that in ninety-eight out of a hundred trips he went east of Chambers Island. His experience was confined to the last thirty or forty years and to pleasure boats.[63]

Dr. E. V. McComb also testified to experience with small pleasure boats extending over the last seventeen years.[64]

Meredith P. Sawyer, one of the Counsel for the State of Michigan in this action, assumed the role of witness and told of his experience on yachts and small pleasure boats.[65] He also gave at some length his views on the various channels and sailing courses and upon other matters of navigation.[65a]

The testimony of Messrs. Henes, McComb and Sawyer was to the general effect that the small pleasure craft with which they were familiar preferred to take the Strawberry Island passage, by reason of the good harbors there, and the smaller amount of rough water. It was explained that the Strawberry Channel is now well lighted.

The last witness to give evidence on this subject was J. Hubert Frankcart. He told of a trip which he had taken from Chicago to Green Bay. After testifying that the ship followed the east shore of the Peninsula, and stopped at Ephraim,[66] he admitted that he did not see any of this as he was asleep at the time.[67] He also solemnly testified that his mother-in-law came to Green Bay in 1804, and that steamships were plying in the bay at that time.[68] This evidence is noteworthy in view of the generally accepted fact that

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[63] R. pp. 361, 366.
[64] R. pp. 369–373.
[65] R. p. 377.
[65a] R. p. 395–404.
[66] R. p. 775–776.
[67] R. p. 778, 779.
[68] R. pp. 771, 777.

the steamboat was invented in 1806 and made its first appearance on the Great Lakes in 1819.

It appears from the above testimony that there is a good deal of difference of opinion among the witnesses as to which channel was the most popular in the early days of their experience. We submit, however, that the weight of the testimony is to the effect (1) that most of the vessels which went through the Strawberry passage did so for the purpose of trading at the villages on the shore of the Peninsula, and (2) that the larger vessels especially preferred the west channel.

**History of the settlement on the peninsula.**

In view of the fact that within the memory of witnesses now living many vessels chose the Strawberry passage for the purpose of trading with the villages on the peninsula, it becomes important to determine whether or not there were any such trading points in existence in and prior to 1836. On this point the record is conclusive to the effect that there were no such settlements until a considerable time after that year.

Michigan Exhibit 155 is a detailed account of a journey along the shore of the east coast of the Bay in 1825, written by a Mrs. Baird, who was a member of the party. She notes the various camping places and describes the scenes. Nowhere does she mention a single settlement or even the isolated residence of a white man. The whole account indicates that the territory was still part of the unbroken wilderness. Mrs. Baird's failure to mention any settlements is well nigh conclusive evidence that there were none at that time.

In Mr. Holand's History of Door County, Wisconsin, it is stated that the first permanent settlement on the Door County Peninsula was established on Rock Island in 1835 or 1836. The first white man's habitation in Door County was a house

built on Detroit Island in 1834.[69] Thus, it is clear that no settlements were established on the mainland of the peninsula until after 1835.

The village of Fish Creek, opposite the Strawberry passage, was founded in 1842.[70]

As late as 1845 there was not a pier between Fort Howard and the mouth of the bay, where steamships could take on wood.[71]

Michigan's witness Lyon testified of his own memory that "There was very little in Door County" as late as 1856.[72]

Michigan's witness McDonald testified as follows:[73]

> "Q In your earliest recollection, Ellison's Bay and Sister Bay and other little points along the East shore of Door County, were not settled were they?
>
> A Well, there were people living there.
>
> Q But they were not centers or trading centers?
>
> A No"

The time to which Mr. McDonald referred as being his earliest recollection was probably in the '60s, for he was born in 1859, on Washington Island.[74]

### Size of vessels.

As has been pointed out above, the weight of the testimony is to the effect that larger vessels avoided the Strawberry passage, and only the smaller ones ordinarily went through. It appears from the testimony of Michigan's witness Lyon, that in the early days of his recollection, to-wit, in the '50s and '60s, a "good size vessel" was one drawing nine feet of

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[69] Michigan Exhibit 128, pp. 33–36.
[70] Michigan Exhibit 128, p. 44.
[71] Michigan Exhibit 128, pp. 43–44.
[72] R. p. 110.
[73] R. p. 356.
[74] R. p. 325.

water and carrying 250,000 feet of lumber.[75] He further testified that boats carrying more than 175,000 feet of lumber were big enough to avoid the Strawberry passage.[76]

As an example of what was probably called a small boat in those days, we refer to the testimony of the witness McDonald, who testified that the early boats used in the neighborhood of Washington Island were about thirty feet long, with a capacity of from one to four tons; obviously, very inconsiderable vessels.[76a]

It is important to note that the Michigan boundary is described as "the most usual *ship* channel." It is not likely that the tiny fishing boats were the ships to which Congress referred. It seems more likely that Congress had in mind vessels of some magnitude.

Wisconsin Exhibit 89 gives a list of nineteen steamboats navigating the Great Lakes in 1836 and 1837, and their tonnage ranges from 210 to 472 tons. As early as 1819 the vessels in ordinary use varied from ten to sixty tons burthen.[77] A table giving figures concerning the tonnage of sixty-one steamboats and 225 sailing vessels in use on Lakes Erie, Michigan and Superior, about 1838 or 1839, shows that sixty-one steamboats had an aggregate tonnage of 17,324 or an average of about 300 tons, while 225 sail boats had a total tonnage of 17,988 or an average of eighty tons each.[78] These were the "ships" which Congress doubtless had in mind, and were vessels which the witnesses who testified in this case referred to as larger vessels, the comparison being made with reference to the small fishing boats in common use in the neighborhood of Washington Island.

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[75] R. pp. 107–108.
[76] R. p. 104.
[76a] R. p. 356.
[77] Wisconsin Exhibit 89, p. 1.
[78] Wisconsin Exhibit 90, p. 3.

## ACQUIESCENCE.

**Even if the Court were to disregard the proof submitted by Wisconsin to sustain her claim to the boundary, still Michigan could not prevail because under the decisions of this Court, she has acquiesced in and accepted the boundary as claimed by Wisconsin for such a period of time that she is not now entitled to relief, even though it be conceded that she was misinformed and that her failure to assert her claim was due to inadvertence.**

The doctrine of acquiescence has been the result of the desire on the part of courts to bring about settlement of disputes, and to prevent the institution of suits concerning claims which arose many years prior to the commencement of action, and at a time when the persons best able to give evidence have passed to their reward, and the proof in the case would be largely the subject of conjecture and inference. Thus, Vattel, in his Law of Nations, has said that:

> "The tranquillity of the people, the safety of States, the happiness of the human race do not allow that the possessions, empire and other rights of nations, should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title. Book II, c. 11, sec. 149." (Quoted in *Indiana v. Kentucky*, 136 U. S. 479, 511.)

Likewise, Wheaton on International Law says that:

> "The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one

> State excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. Part II, c. IV, sec. 164." (Quoted from *Indiana v. Kentucky*, 136 U. S. 479, 511, 512.)

And so this Court has said in *Rhode Island v. Massachusetts*, 4 How. 591, 639, that:

> "No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary."

Analysis of the cases already cited in the summary of this brief shows that acquiescence was held to be established in each case by lines of evidence identical with the facts in this case. Thus, in *Rhode Island v. Massachusetts*, 4 How. 591 (1846), it was held that the following facts were sufficient to establish acquiescence:

a. Agreement on the boundary by the commission.
b. Acceptance of that boundary for a period of two hundred years.
c. Construction of the boundary by the complainant contrary to her claims in the particular suit.
d. Possession by the defendant for a long period of time under claim of right.

In *Missouri v. Iowa*, 7 How. 660 (1849), it was held that the following state of facts were sufficient:

a. Recognition by the Federal Government.

b. Recognition by complainant state for a period of ten years.
c. Establishment of county lines to the boundary by each of the states.
d. Resultant injustice if changes were to be made.

In *Missouri v. Kentucky*, 11 Wall. 395 (1871), it was held that the following state of facts established acquiescence:

a. Actual and exclusive possession for many years preceding the action.
b. Counties organized to include the territory in dispute by the State of Kentucky.
c. Exercise of the elective franchise by the residents of the disputed territory as qualified voters of the State of Kentucky.
d. Service by residents of the disputed territory on the governing bodies of the State of Kentucky.
e. Judicial proceeding recognizing the claim of Kentucky.
f. No effort to subject the people to the jurisdiction of the claimant State of Missouri.

In *Indiana v. Kentucky*, 136 U. S. 479 (1890), it was held that the following facts established acquiescence:

a. A long period of time elapsed before the claim was made.
b. Admission of assertions of authority by the State of Kentucky and exercise of government functions by the state within the disputed territory.
c. Rights of property accrued to private persons during the period while Kentucky was in possession.

In *Virginia v. Tennessee*, 148 U. S. 503 (1893), the following facts were held to be controlling:

a. Running, location and marking of line as a result of an agreement entered into by a commission appointed by both states.
b. Moral considerations springing from regard to natural sentiments of those who had lived within the

disputed territory for a long period of time relying upon the claim of the state in possession at the time of the commencement of the action.

In *United States v. Texas*, 162 U. S. 1 (1896), controlling consideration was given to:

a. Recognition by the claimant state for a long period of time.
b. The fact that the course of the stream claimed to be the boundary by the claimant state did not follow the general course of another stream which more nearly followed the course specified in the boundary definition.

In *Oklahoma v. Texas*, 260 U. S. 606 (1923), controlling consideration was given to the following factors:

a. Sale of lands by the claimant state within the disputed area.
b. Settlement and improvement of the disputed area by residents thereof in reliance upon the line as it had been recognized for a considerable period of time prior thereto.

In *New Mexico v. Colorado*, 267 U. S. 30 (1925), it was held that adoption of a line established by the Federal Government and recognition of it for a period of seven years was sufficient acquiescence to prevent relief after such a period.

Likewise, this Court has held that a claim of mistake and misunderstanding or lack of information is not sufficient to defeat the operation of the doctrine of acquiescence, and prevent relief where there has been a long period of delay in making claim to the disputed territory.

*Rhode Island v. Massachusetts*, 4 How. 591.
*Virginia v. Tennessee*, 148 U. S. 503 (1893).

In view of these decisions, it becomes important to consider the various lines of evidence establishing recognition of Wisconsin's boundary throughout the period from 1836 down to the present time.

## MONTREAL RIVER SECTION

**Within the principles laid down by this Court, regardless of what the situation may have been in 1836 or in 1841 when the survey of the boundary line from the Montreal River to Lac Vieux Desert was made and the particular branch of the Montreal River selected, Michigan has so long accepted the action of the Federal authorities, approved at that time by her own representatives, that she will not now be permitted to deny that such boundary is correct as laid out.**

### MICHIGAN'S CLAIMS AND CONCESSIONS.

In considering the situation created by Wisconsin's exercise of dominion over the disputed area and Michigan's acquiescense therein, it must constantly be borne in mind that Michigan has from the beginning been well informed as to the general course of the boundary line. That Michigan was thus informed appears from the following facts, among others:

Lucius Lyon was in continual correspondence and conference with Henry R. Schoolcraft, Governor Lewis Cass, and other prominent residents of Michigan, who were advised regarding conditions in and geography of the Upper Peninsula; Lyon made an investigation of his own in 1839, and reported it to the members of the Michigan legislature; Douglass Houghton investigated the boundary, unofficially at first and later officially as commissioner appointed by the legislature, and reported to the Governor and the legislature what had been done; thereafter, Michigan's representatives in Congress, acting upon the conclusions of Captain Cram, which were also the conclusions of Houghton, devised a boundary description which followed the general course of the intended boundary line and became the boundary of Wisconsin; in 1850, Michigan adopted her second constitution, in which the boundary was described in the identical words of the Wisconsin constitution, except that the words "as marked upon the survey of Captain

Cram" were omitted; the constitutional convention of 1867 considered that the boundary line was definitely fixed and satisfactory to Michigan; and the constitutional commission of 1873 arrived at the same conclusion.

Michigan, in her brief in opposition to the motion for dismissal of this action, conceded that Wisconsin assumed jurisdiction of this area as early as 1846. We claim that 1836 is the correct date, because at that time the boundary line was established as far as the Montreal River is concerned, and jurisdiction was asserted from that time on. In the complaint Michigan concedes that Wisconsin has been in possession for a great many years and "has asserted and does now assert civil, criminal and political jurisdiction over * * * the territory" in the Montreal River section,[1] and that she "has unlawfully taxed and still continues to unlawfully tax said property, and the taxes assessed thereon have been paid and continues to be paid to the State of Wisconsin."[2] By this general language we understand that Michigan claims Wisconsin has had possession since 1846 at least. In their brief in opposition to the motion to dismiss, counsel state "Wisconsin took possession not in 1836 as stated, but in 1846 or thereafter, under the express provisions of its statehood grant."

## WISCONSIN'S ASSERTION OF AUTHORITY AND EXERCISE OF JURISDICTION.

The witness Lawler testified that taxes have been assessed by the State of Wisconsin along the boundary for forty years,[3] that there have been within the disputed area in Vilas County 44,028 transfers[4] not including mortgages and satisfactions thereof, and that most of the land was entered by prospective purchasers between 1870 and 1880. The record

[1] Plaintiff's Complaint, p. 40, paragraph 23.
[2] Plaintiff's Complaint, p. 40, paragraph 23.
[3] R. p. 470.
[4] Wisconsin Exhibit 338.

also shows that in Forest County, only a small portion of which is in dispute, there are 696 transfers.[5] In Iron County there were 33,888 transfers.[6]

Beginning in 1850, Wisconsin established county government in the disputed area. By Chapter 226, Laws of 1850,[7] Portage County was divided and Marathon County established with its boundary line running along the state boundary line from Range 2 East to the range line between Ranges 9 and 10 East. By Chapter 120, Laws of 1860,[8] part of Oconto and Shawnaw Counties extending to the boundary line in Range 10 East was given to Marathon County. By Chapter 411, Laws of 1885,[9] part of Lincoln County between Range 10 East and the line between Ranges 3 and 4 East along the state boundary line was detached from Lincoln County and formed into Oneida County. By Chapter 278, Laws of 1897,[10] all of Townships 41 and 42, Range 11 East, were detached from Oneida County and attached to Vilas County and to the town of Eagle River in said county. By Chapter 202, Laws of 1905,[11] the town of Hackley was created by detaching certain territory along the boundary line from the county of Forest and attaching it to the County of Vilas. By Chapter 74, Laws of 1883,[12] Townships 41, 42, 43, 44, 45, 46 and 47, North, of Ranges 2 and 3 East were detached from Lincoln County and attached to Ashland County and were attached to various towns in Ashland County for local governmental purposes. By Chapter 8, Laws of 1893,[13] Iron County was created out of the territory attached to Ashland County. By Chapter 150, Laws of

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[5] R. p. 339.
[6] Wisconsin Exhibit 341.
[7] Wisconsin Exhibit 362.
[8] Wisconsin Exhibit 362.
[9] Wisconsin Exhibit 362.
[10] Wisconsin Exhibit 362.
[11] Wisconsin Exhibit 362.
[12] Wisconsin Exhibit 362.
[13] Wisconsin Exhibit 362.

1893,[14] the County of Vilas was created out of portions of the County of Oneida along the boundary line and additional territory was assigned to Iron County by adding certain towns along the boundary line in Range 4 East to this County and attaching it for governmental purposes to the town of Vaughn where the city of Hurley is now situated. By Chapter 237, Laws of 1911,[15] the town of Carey was created in Iron County by detaching certain territory from the town of Vaughn. This territory is again located in the disputed area. By Chapter 641, Laws of 1911, certain territory along the boundary line in Iron County and in the town of Vaughn was detached from that town and the town of Oma created. Chapter 379, Laws of 1919, [16] certain territory was detached from the town of Montreal in Iron County and attached to the Village of Hamilton, which joins the city of Hurley within the disputed area. Numerous other towns have been created in this section of the disputed area, as appears from Wisconsin Exhibits 376 and 377.

All township plats made by the United States government survey in this disputed area were turned over to Wisconsin, as were likewise the notes upon which such plats or surveys were based.[17] Repeated government survey maps, dated from 1850 to 1900, show that the territory now in dispute was assigned to Wisconsin, and the boundary line was as claimed by Wisconsin.[18]

In Wisconsin's Exhibits 190, 191 and 192, it appears also that the Michigan county lines were run to the boundary line as claimed by Wisconsin and were never extended any further. The Wisconsin surveys also show the boundary line as claimed

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[14] Wisconsin Exhibit 362.
[15] Wisconsin Exhibit 362.
[16] Wisconsin Exhibit 362.
[17] Wisconsin Exhibit 364.
[18] Wisconsin Exhibits 185, 186, 187, 188, 189.

by Wisconsin,[19] and these surveys likewise show that Wisconsin's lines ran up to that boundary line. Repeated official United States government maps make the same division of territory between Michigan and Wisconsin, and so authentic and accurate a map as that issued by the Department of the Interior, United States Geological Survey, assigns the territory that is now in dispute to Wisconsin,[20] and again shows that the Michigan counties are confined to the territory originally assigned to Michigan and no more, and that Wisconsin counties extend to the boundary line as now claimed by Wisconsin.

The representatives of Michigan in this suit stipulated that as early as 1874 taxation by Wisconsin within the Montreal River section commenced, and from that time on continued, as more and more property was entered, up to December 1, 1886, at which time the final description within the disputed area was added to the tax roll and from that time on taxation by Wisconsin in the entire area has continued to the present time.[21]

County roads have been laid out in this region by Wisconsin counties, and highway taxes levied therefore.[22]

The witness J. F. Sullivan, one of the first settlers in Iron County, came to that county in 1882 from Ashland, having walked the entire distance. He stated that at that time there were no settlements at Hurley except a few camps, that settlement started in 1885, that the first election in Iron County was held on the first Tuesday of April of that year, at which time the town of Vaughn was organized; and that this town took in the territory on both sides of the West Branch of the Montreal River, which was at that time

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[19] Wisconsin Exhibits 193, 194, 195, 196.

[20] Wisconsin Exhibits 199, 200.

[21] Stipulation, R. p. 1010.

[22] Stipulation, R. p. 927, 930, Wis. Exh. 376. R. p. 933, 944, 945, 958.

called the Gogogashugun East Branch was called the Montreal River. Soon after settlement started, the name West Branch was given to the Gogogashugun because the Indian name was hard to pronounce. Voting started in Hurley for state and county officers and has continued ever since. By 1886 some large mills were erected at Van Buskirk which is near Hurley and within the disputed area. The first passenger train arrived in Hurley July 3, 1885, from Ashland, on what is now the Northwestern line. In 1886, the Soo line came in as did the Rhinelander branch of the Northwestern.[23] The South Shore came through Iron County in 1888.

The first city hall was built in 1885. In 1886 another building was bought for a city hall and thereafter the city hall was rebuilt in 1887.[24] The present population of Hurley is about 3,500. The Montreal location, which is now the city of Montreal, was made in 1885, and in that year school district No. 1 was organized and took in everything from Hurley to Pence. This was done in order to get the valuable portion of the territory into the school district, and from that time on the boundaries of the district were substantially the same as they are now. The first school house in Hurley was built in 1886. The high school building was built about 1901. The present court house of Iron County in the city of Hurley was built by the town of Vaughn for a town hall and later sold to the county. The county jail was built in the city of Hurley in 1897.

Mrs. Luella Trier, county treasurer of Iron County for the past fourteen years, except for an interruption of two years during that period, testified from the records of the county that the valuation for tax purposes in 1924 of the city of Montreal was $2,473,274, for the town of Oma,

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[23] R. p. 945, 946.
[24] R. p. 947.

$12,191.89, for the city of Hurley, $3,619,886.81, for the town of Carey, $561,946 and for the town of Kimball, $641,860.[25]

The school levy of the Town of Vaughn for 1893 was $1,100, and in that year a county road was adopted within the disputed area.[26] In that same year state taxes of $2,888.10 were levied within the disputed area. On December 15, 1893, $37,000 was voted for the purpose of building a jail in the court house, and the present court house was purchased the same date for $32,917.04.[27].

In 1895 the valuation of the town of Vaughn was $1,600,000, and was equalized by the town board at that time at $2,029,600. The town of Vaughn at that time included the city of Hurley.

John G. Becker, Register of Deeds of Iron County, testified that Exhibit 378 showed the plats filed in Iron County, covering property within the disputed area. Over twenty such plats have been filed to comply with the laws of the State of Wisconsin. Moreover, corporations doing business in Iron County west of the Montreal River and east of the West Branch, some fifteen in number,[28] would have their contracts invalidated and their titles to lands put in doubt if it should be found that the territory now in dispute should actually go to Michigan.[29]

Ida Bradley, county superintendent of schools since 1920, testified to the schools that came under her jurisdiction and the schools in Iron County, and showed that there

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[25] County Board Records, p. 92, R. p. 957.

[26] R. p. 958.

[27] R. p. 959.

[28] Wisconsin Exhibit 379.

[29] Sect. 9053 (166) Cahills Compiled Laws of Michigan. "No foreign corporation shall be capable of making a valid contract in this state until it shall have fully complied with the requirements of the laws of this state in respect thereto and at the time holds an unrevoked certificate to that effect from the Secretary of State."

are at least twelve schools in the disputed area which would be affected by the present proceedings.[30]

Harold F. Connors, principal of the high school at Hurley, testified that School District No. 1 included the city of Hurley and the city of Montreal, the towns of Kimball, Carey, Pence and part of Oma, and that Exhibit 370 shows the limits of School District No. 1.[31] The school census for 1925 shows that Hurley has 1206 children of school age, Montreal 3,440, Carey 89, and that within the disputed area was located the only high school for District No. 1, comprising territory on both sides of the West Branch of the Montreal River, this high school being the Hurley high school, and ten graded schools belonging to the same district are also within the disputed area. The witness also testified that taking the schools away on the east side of the West Branch of the Montreal River would leave the so-called River Branch and Hinkle Schools, shown on Exhibit 378, as being within the town of Kimball with but seven sections of land to support the two schools.[32] In the town of Pence the remaining schools would be left with a greatly decreased valuation out of which to raise money for support of their schools. The city of Montreal would also have its valuation materially decreased, and it would leave the city of Hurley and the town of Carey with 1,206 children to support a high school, three graded schools and four rural schools, and the rural schools in the town of Kimball have never been able to support themselves by taxes raised within that town.[33] At the present time Hurley is spending about $4,000 a year more on the schools in this town than it is receiving in taxes. Furthermore, there

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[30] Wisconsin Exhibit 377. Printed in the Supplement to this brief as Figure 14.

[31] R. p. 913, 914.

[32] R. p. 915, 916.

[33] R. p. 916.

are no facilities in the schools west of the West Branch for the teaching of high school courses, and owing to the overcrowded conditions west of the West Branch a new graded school is now necessary, and plans for building it are under way.[34] Moreover, Hurley has facilities for accommodating children from the outlying districts and such children are now being transported from Gile and rural schools to the city of Hurley. There are fifty-one teachers employed in the district, and the entire machinery of education is so arranged that the high school education for the entire district can be taken care of in the Hurley high school, and of the high school students, a considerable number come from west of the West Branch. This high school enrollment was 311 for the year 1924–1925.[35] The high school has facilities to accommodate 350, there being 26 rooms in the high school building. The town of Oma, especially that part included in the disputed area and in District No. 1, is very much unsettled, and if the district is taken away, would be left without facilities.[36]

Everis H. Reid, clerk of Joint School District No. 1, testified that the assessed valuation of the school district was $7,675,698.81, and that the district has bonds outstanding aggregating $149,500; that if the territory east of the West Branch were to be taken away from the district, the remaining property would not have a valuation sufficient to sustain the bond issue outstanding against the district, considering that the district under the constitution is limited to an indebtedness of not in excess of 5 per cent of the assessed valuation.[37] The bond issues have been outstanding since 1916, and taxes, interest and principal are raised

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[34] R. p. 916.
[35] R. p. 917.
[36] R. p. 918, 919.
[37] R. p. 962.

from the entire district.[38] The present high school was built in 1901, and an addition was built in 1916.[39] The district employs 61 teachers, 16 in the high school, the remainder in the graded schools. A 12-room graded school is contemplated at Gile because of overcrowded conditions, and requires an additional $100,000 bond issue which could not be issued if the territory east of the West Branch were to be taken away because the remaining territory would not have a sufficient value to sustain even the present outstanding bond issue.[40]

The testimony with reference to the creation of counties, as above outlined, has shown that the territory around Hurley, Wisconsin, now in dispute was at one time in Lincoln County. The county clerk of Lincoln County showed from the county records that as early as February 21, 1876, the town of Robertson, in Lincoln County, was organized out of territory in townships 40, 41, 42 and 43, Range 9,[41] part of which territory is in the disputed area, and, moreover, that highway taxes raised in townships 41, 42, and 43, Ranges 8, 9 and 10 East, were set aside for road purposes.[42]

Miss Mary Houg produced the resolutions of the County Board of Vilas County, showing the establishment of the towns of Winchester and State Line along the boundary by the County Board of Vilas County, and also Chapter 9, Laws of 1907, establishing the town of Presque Isle, and Chapter 202, Laws of 1905, establishing the town of Hackley, all of them along the boundary line as shown by Exhibit 376, also produced by her.[43] She testified that the supervisors from the towns above described participated in the County Board pro-

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[38] R. p. 963.
[39] R. p. 963.
[40] R. p. 964, 965.
[41] R. p. 926.
[42] R. p. 927.
[43] R. p. 928, 929, 930.

ceedings of her county, that there are improved highways laid out in townships 43 and 44 in her county, that state highway No. 10 runs through about twenty-five miles of Winegar, part of the highway being a state highway and part of it a county trunk, maintained by state and county funds,[44] that the town of Winegar referred to has a population of two hundred people, and Winchester is another small town in the same area, that there are numerous rural and graded schools located in this disputed area, likewise that there are numerous other highways, as is shown by Exhibit 376. Moreover, these highways and schools are maintained from taxes spread at large in the county, and the county spent money in the towns for roads.[45]

Mr. W. T. Lennon, mayor of the city of Hurley, testified that the city had outstanding $14,695 of street improvement bonds issued June 1, 1921; $6,620 in sewer bonds issued June 21, 1921; $17,525 in street improvement bonds, dated July 1, 1922; and waterworks construction bonds, dated January 1, 1923, $49,750; making a total of $88,590 in bonds outstanding within the city of Hurley for public improvements.[46]

It was also stipulated that the county buildings had been valued as of January 1, 1925, as follows: court house complete, $70,000, upon which $50,000 in state insurance was carried; $13,500 for the contents of the court house upon which $10,000 in state insurance was carried; $16,000 for the jail and residence upon which $12,500 in state insurance was carried, and $250.00 value of contents, upon which $200.00 of insurance was carried.[47] It appears also that Iron County, which will include the area in dispute, has assumed $60,000 of indebtedness as of 1920 on a sanitarium erected and main-

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[44] R. p. 930.
[45] R. p. 931, 932, 933.
[46] R. p. 966, 967.
[47] R. p. 967.

tained by the Counties of Iron, Ashland and Bayfield, said sum representing the share of Iron County.[48]

Not a single effort to assert jurisdiction over the disputed area was made by Michigan from 1836 to 1923, when this action was commenced. No effort to tax, no effort to conduct elections, no effort to organize government, not even a written or verbal assertion of authority was made, unless it could be said that a claim was made by the constitutional convention and the constitution of 1907. Michigan's representative, appointed in that year to negotiate a settlement, soon became convinced that Wisconsin was going to insist on claiming the boundary as it was described in her enabling act of 1846, and being so informed, abandoned his efforts and from that time on nothing whatsoever was done until 1919. More than this, Michigan county lines have been established up to the Wisconsin line. She adopted the Wisconsin boundary line as her line by her constitution of 1850. After doing this she stood by for 75 years while the country developed, while settlers adapted themselves to the laws and customs of Wisconsin, thus holding out to the world that she was content with her boundaries and accepted Wisconsin's assertion of the right to the territory which she now claims. Even after the commencement of this suit, she has published her biennial manual for 1925 containing the maps of the various congressional districts, assembly districts and senatorial districts, in which the Montreal River and not the West Branch of the Montreal River is shown as the boundary, in which no claim is made to the City of Hurley or to any part of the territory which she now claims in the Montreal River section, and in which the boundary line, as originally laid out in 1848 by William A. Burt, is published as the boundary line of the State of Michigan.[49]

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[48] R. p. 968.

[49] Michigan Manual, 1925, Plates 4, 13, 15, 17, 21—Oppsite p. 128. These maps are printed in the supplement to this brief, as Figures 33 and 34.

THE FOREGOING FACTS AS TO THE MONTREAL RIVER SECTION OF THE BOUNDARY ESTABLISH ACQUIESCENCE WITHIN THE DECISIONS OF THIS COURT SUFFICIENT TO REQUIRE DENIAL OF ALL RELIEF.

Upon this showing we inquire whether all the sentiment created by years of association with the laws, customs and ideals of the affected communities as integral parts of the commonwealth of Wisconsin, the loyalty, faith and devotion to government, that comes from long association with a given state should all be destroyed to gratify the ambitions of generations far removed in years from those responsible for this condition, merely on the assertion now made, that if the present generation could have dealt with the situation it would have done a better job? We say that the question has been repeatedly answered in the negative by the forceful language of this Court when similar situations were presented.

We have in the facts of this case the long and affirmative recognition by Michigan of Wisconsin's boundary, evidenced by the modified boundary description contained in her constitution of 1850 and by her failure to claim the territory now claimed from that time to 1923, a state of facts far stronger than that which controlled the decision in *Rhode Island v. Massachusetts*, 4 How. (1846) 591, at 638, 639.

> "More than two centuries have passed since Massachusetts claimed and took possession of the territory up to the line established by Woodward and Saffrey. This possession has ever since been steadily maintained, under an assertion of right. It would be difficult to disturb a claim thus sanctioned by time, however unfounded it might have been in its origin.
>
> The possession of the respondent was taken not only under a claim of right, but that right in the most solemn form has been admitted by the complainant and by the other colonies interested in opposing it. Forty years elapsed before a mistake was alleged, and since such allegation was made nearly a century has transpired. If

in the agreements there was a departure from the strict construction of the charter, the commissioners of Rhode Island acted within their powers, for they were authorized 'to agree and settle the line between the said colonies in the best manner they can, as near agreeable to the royal charter as in honor they can compromise the same.' Under this authority, can the complainant insist on setting aside the agreements, because the words of the charter were not strictly observed? It is now clear that the calls of the charter were deviated from by establishing the station of Woodward and Saffrey. But if in this respect there was a deviation, Rhode Island was not the less bound, for its commissioners were authorized to compromise the dispute. Surely this, connected with the lapse of time, must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change."[50]

While it is true that no commissioners were ever appointed who agreed upon the boundary, the fact remains that the appointed representatives of Michigan who accompanied Captain Cram in 1841 accepted the construction placed upon the Michigan Boundary Act of 1836 by Captain Cram. Moreover, the Michigan delegates in Congress after the Legislature of Michigan had requested an immediate settlement adopted the same construction and accepted that interpretation and construction of the act of 1836, and in an effort to avoid a controversy, the Wisconsin boundary definition was adopted. In 1850 Michigan adopted that same definition for the Montreal River section. We submit that these different proceedings are as effective and should be as binding upon Michigan now as the acts of the commissioners who were responsible for the boundary in the above case. Likewise, the consistent assertion of Wisconsin that she has a right to this territory, which

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[50] Rhode Island v. Massachusetts, 4 How. (1846) 591, 638, 639.

confirmed the original conclusion of the Court in *Rhode Island v. Massachusetts*,[51] again justifies the same decision in this case.

The recognition of Wisconsin's claim by the Federal government is as strong as the asserted recognition by the Federal government in the case of *Missouri v. Iowa*, 7 How. (1849), 660, 673, which prompted this Court to decide as it did in that case.

> "From the time that Missouri became a State to this day, Sullivan's line has been recognized by the United States as the true northern boundary of Missouri, so far as it could be done through the department of public lands."[52]

The recognition by failure to assert any other claim for a long period of time, which fortified the conclusions of the Court in *Missouri v. Iowa*, is present in this case,[53] with even a stronger set of facts to support the following statement of the Court:

> "Nor has Missouri any right to complain. She herself, for ten years and more after coming into the Union, recognized the Indian lines west and north as her proper boundary; her counties were extended up to these lines before the present controversy arose; and so counties in the territory north were established up to this recognized line without objection on the part of Missouri. And when Congress ceded to Missouri the country west of Sullivan's line, both parties to that cession acted on the assumption, that the ceded territory next the Missouri River was bounded on the north by a line that should be run due west from the northwest corner of the old Osage boundary. To this extent the Indian title was extinguished, and to no other extent did the United States cede that country."[54]

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[51] Rhode Island v. Massachusetts, 4 How. (1846) 591, 638, 639.
[52] Missouri v. Iowa, 7 How. (1849), 660, 673.
[53] Missouri v. Iowa, 7 How. (1849), 660, 677.
[54] Missouri v. Iowa, 7 How. (1849), 660, 677.

And, likewise, the principle in *Missouri v. Kentucky*, 11 Wal. (1871) 395, and *Indiana v. Kentucky*, 136 U. S. (1890) 479, 518, when applied to the facts in this case must result in but one conclusion and that is that Michigan is not now in a position to change her attitude with respect to this area because of the existence of the facts above outlined.

We have also in this case the moral considerations which moved the Court, in *Virginia v. Tennessee*, 148 U. S. (1893) 503, 524, to say:

> "There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home and to family, on which is based all that is dearest and most valuable in life."[55]

And, lastly, we have the failure of Michigan to assert her claim for sixteen years after she was clearly aware of the rights she now claims, which in accordance with the principles laid down in *New Mexico v. Colorado*, 267 U. S. (1925) 30, 41, were deemed decisive, though only seven years had there elapsed.

> "And, independently of these matters, New Mexico is bound by its own recognition and adoption of the Darling line, from 1912 to the beginning of this suit, after its admission to statehood. *Missouri v. Iowa*, supra, p. 677."[56]

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[55] Virginia v. Tennessee, 148 U. S. (1893) 503, 524.
[56] New Mexico v. Colorado, 267 U. S. (1925) 30, 41.

## MENOMINEE RIVER SECTION

**The Menominee River boundary, as defined in the Michigan Statehood Act and as modified and interpreted in the Wisconsin Enabling Act, gives to Wisconsin the islands below Quinnesec Falls in the Menominee River, and to Michigan the islands above Quinnesec Falls in the Menominee River and Brule River. This division has been accepted by Michigan as a modification of its original boundary definition designating the main channel of the Montreal River as the boundary in all cases where islands are involved on either side of Quinnesec Falls.**

### MICHIGAN'S CLAIM.

The complaint in this case asserts that the main channel of the Menominee River is the proper boundary line, and that by reason of that fact, islands which have been surveyed as being within the State of Wisconsin which are in fact on the Michigan side of the main channel should now be resurveyed so as to bring them into the State of Michigan, as stated in the outline of "historical background" of this controversy.

The complaint also states that the legislature of Michigan had the report of Captain Cram before it in 1841, in which he also referred to the islands in Green Bay. With that information before it, the legislature of Michigan suggested that a proper boundary line definition should be determined upon. This resolution of the Michigan legislature was sent to Congress. Apparently, in answer to the request of the Michigan legislature, her representatives, acting as Michigan agents in Congress, caused the introduction of two bills, the latter of which provided for a division of the islands just as it was later made. Both bills failed, it is true, but not because of any protest or objection on the part of Michigan. Then came

the Wisconsin Enabling Act, and the representatives of Michigan, with the delegate of Wisconsin, again agreed upon the division, and again without any protest from the State of Michigan.

HISTORY OF LEGISLATION RELATING TO DIVISION OF ISLANDS

After the report of Captain Cram, made to Congress, in which he stated that it would be extremely difficult to determine the main channel of the Menominee River in many instances, a bill was introduced to provide for a division of the islands between the two states. Thereafter, in the Wisconsin Enabling Act, provision for the division of the islands was again adopted as a result of an agreement entered into between the representatives of Michigan and the delegate of Wisconsin, and a survey was ordered of the boundary line between the south shore of Lake Brule and the headwaters of the Montreal River. That survey marked the course of the part of boundary line that was not altogether a water boundary. It was ordered within four days after the Wisconsin Enabling Act was passed, although the Wisconsin Enabling Act provided that the settlement of the controversy as to this boundary was not to be binding on Congress unless accepted by Michigan within two years. The State of Wisconsin was admitted into the Union with a specific provision that her boundaries were those specified in her enabling act and no conditions were added in the act of admission. Thereafter, in 1850, Michigan adopted her second constitution. That constitution, in place of defining the boundary line as it was defined in her original statehood act, followed the identical language of the Wisconsin Enabling Act, omitting, however, the words "as shown upon the survey of Captain Cram." As previously stated, this had become unnecessary because the survey of Captain Cram had been supplemented by the actual laying out of the boundary line along the course surveyed by Captain Cram.

By thus adopting the language of the Wisconsin Enabling Act, the State of Michigan departed from the wording used in her own statehood act in that the boundary from the Menominee River leading toward the Lake of the Desert was no longer described as running "in a direct line to the nearest headwater of the Menominee River," but instead that part of the line was defined just as it was defined in the Wisconsin Enabling Act as "up the channel of said river to the Brule River; thence along the last mentioned river to Lake Brule; thence along the southern shore of Lake Brule in a direct line to the center of the channel between Middle and South islands in the Lake of the Desert."

RESULT OF ADOPTING MICHIGAN'S CONTENTION

If the plaintiff in this instance is right in her contention that her boundary line was originally definitely fixed so as not to be altered by future action, then this part of the boundary was definitely fixed not as following up the Brule River but as following up the Paint River to its headwaters, which, as the record in this case shows, are within two miles of the Lake of the Desert, and when Michigan adopted her constitution of 1850, she must have done so for the purpose of accepting the boundary line as more specifically described in the Wisconsin Enabling Act. To do this, she had to accept the boundary line as a whole. She could not accept it in part and reject it in part. If this is a result of her action, then it follows that when she accepted that part of the boundary which follows the wording of the Wisconsin Enabling Act, she thereby must be held to have also accepted that part of the boundary not referred to in her constitution, but which was also referred to in the Wisconsin Enabling Act, that is, she accepted the division of the islands in the Menominee River. This, apparently, was the understanding of the people of Michigan, and still is the understanding of everyone in Michigan except counsel for the plaintiff in this case. It is likewise the understanding of the pub-

lic officials of the United States who had charge of the sale of public lands, and clearly it was the understanding of the State of Wisconsin. Michigan was as familiar with the situation in the Menominee River since the boundary line was defined, or at least since the second survey of the boundary line by Captain Cram, as anyone interested in the controversy. Her commissioner, Douglass Houghton, accompanied the surveying party down the Menominee River, and as he expressed it, "in connection with duties assigned to me relative to the boundary line between our state and Wisconsin, I have been enabled to complete a very perfect geological section of nearly 180 miles in length, crossing from the mouth of the Montreal River of Lake Superior to the mouth of the Menominee River of Green Bay, a district highly interesting both in its geographical and topograhphical features. This section crosses the upper peninsula somewhat further west than any of the sections I have heretofore made."[58]

This information was given to the legislature of the State of Michigan at its annual session of 1842. Since that time Michigan has had available the information as to these islands.

## ISLANDS BELOW QUINNESEC FALLS SURVEYED IN WISCONSIN

Thereafter, the surveys of Michigan and Wisconsin were completed, and the islands below Quinnesec Falls in the Menominee River were surveyed as being in Wisconsin. Most of these surveys were made between 1854 and 1879. Thus, in Township 36 North, of Range 22 East of the 4th principal meridian, several islands were surveyed by Richard L. Hall under his contract of July 22, 1854.[59] The instructions referred to read as follows:

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[58] Wisconsin Exhibit 26.

[59] Wisconsin Exhibit 198, sheet 26.

"The islands in sections 19, 30 and 31 are a correct representation of the survey thereof by Richard L. Hall, deputy

"You are hereby authorized to survey all valuable islands in the Menominee River from its mouth as far up as the Quinnesec Falls, which is as far as the State of Wisconsin, or this office, has jurisdiction. * * *

You will be particular to describe in every instance whether the islands are partially or wholly overflowed, and to what extent, as all over-flowed lands belong to the State of Wisconsin under the act of 28th Sept. 1840."[60]

In Township 36 North, of Range 21 East, islands in sections 23, 24, 25 and 26 were surveyed under the aforesaid instructions.[61] In Township 35 North, of Range 22 East, a like survey was made of several islands.[62] As a result of a ruling made by the Surveyor General's office on the 5th day of June, 1862, the survey of the large island in sections 17, 18, 19 and 20, above referred to, was cancelled, as was that also of the two small islands in section 17, for the reason that the land office considered that this was not an island because the channel to the east of it did not flow water throughout the year. It must be noted that the general land office found it necessary to determine that this was

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surveyor, pursuant to instructions of July 22, 1854. The field notes of which have been examined and approved. Surveyor General's office, Dubuque, August 21, 1855."

[60] Wisconsin Exhibit 365, p. 5.

[61] Wisconsin Exhibit 188, sheet 26.

"This island in sections 23, 24, 25 and 26 is a correct representation of the survey thereof by Richard L. Hall, Deputy Surveyor, in pursuance of instructions of July 22, 1851, the field notes of which have been examined and approved August 22, 1855."

[62] Wisconsin Exhibit 198, sheet 28.

"The islands in sections 6, 7, 17, 18, 19, 20, 30 and 31 are a correct representation of the survey thereof by Richard L. Hall, Deputy Surveyor, in pursuance of instructions of July 22, 1854, the field notes of which have been examined and approved. Surveyor General's office, Dubuque, August 21, 1855."

not an island in order to get away from the provisions of the Wisconsin Enabling Act, giving all islands below Quinnesec Falls to Wisconsin.[63] Likewise, in Township 35, North, of Range 21 Sast, island, in sections 35 and 36 were surveyed under the aforesaid instructions and approved on August 21, 1855.[64] Again in Township 34 North, of Range 21 East, islands in sections 2, 3, 10, 15, 23 and 33 were surveyed pursuant to the foregoing instructions and the field notes approved on August 21, 1855.[65] In Township 33 North, of Range 21 East, the island in section 4 was surveyed pursuant to the foregoing instructions and approved on the same date.[66] In Township 33 North, of Range 23 East, the islands in sections 4, 8, 9, 17, 30 and 31 were surveyed pursuant to the foregoing instructions and the field notes approved on the same date. Also in Township 32 North, of Range 22 East, the islands in sections 1 and 12 were surveyed pursuant to the foregoing instructions and the survey approved on September 24, 1856.[67] In Township 31 North, of Range 23 East, the islands in sections 32 and 33 were surveyed pursuant to the foregoing instructions, and the survey approved on the 21st day of August, 1855.[68] In Township 30 North, of Range 23 East, the islands in section 1 were surveyed pursuant to the foregoing instructions, and the survey approved on August 21, 1855.[69] In Township 30 North, of Range 24 East, the islands in sections 5 and 6 were surveyed pursuant to instructions of the aforesaid date and the survey approved August 21, 1855.[70]

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[63] Wisconsin Exhibit 198, sheet 28, letter attached.
[64] Wisconsin Exhibit 198, sheet 29.
[65] Wisconsin Exhibit 198, sheet 30.
[66] Wisconsin Exhibit 198, sheet 31.
[67] Wisconsin Exhibit 198, sheet 36.
[68] Wisconsin Exhibit 198, sheet 38.
[69] Wisconsin Exhibit 198, sheet 39.
[70] Wisconsin Exhibit 198, sheet 40.

Subsequent to that time a large number of other islands were surveyed by Richard L. Hall and other surveyors, all as being in Wisconsin.[71] The full list of islands surveyed are shown in Wisconsin Exhibits 336 and 337. An examination of these exhibits shows that as early as 1856 transfers of these islands were made, and that the first entry of these islands was made October 9, 1853, and the earliest transfer shown on the records of Wisconsin is on March 12, 1856. From that time on most of the islands were transferred, though several of them are still held by the government.

### Taxation and Sale of Islands by Wisconsin

Taxes were levied beginning soon after the sale of the islands, and have continued, as indicated by Wisconsin Exhibit 337, from that time on, except as otherwise indicated by the exhibit.[72]

Wisconsin has claimed the islands below Quinnesec Falls ever since she was a State. This fact is also conceded by Michigan in her complaint,[73] and on page 134 of her original brief on Wisconsin's motion to dismiss this complaint, she said in part,

> "Wisconsin took possession not in 1836 as stated, but in 1846 or thereafter under the express provision of its statehood grant."

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[71] Wisconsin Exhibit 365.
[72] Wisconsin Exhibit 336 and Wisconsin Exhibit 337.
[73] Plaintiff's Complaint, paragraph 20, p. 36.

No. 26208
Vol. 114.
Page 953 **List of surveyed Islands &c in Menominee River bordering on Marinette Co. Wis.**

| Surveyed Islands | Section | Town | Range | Acreage | Date of Entry | Number of all recorded transfers | Date of Earliest Transfer | Number of transfers during 10 yrs. after first transfer | Date when first taxes were paid to State of Wis. |
|---|---|---|---|---|---|---|---|---|---|
| Lot No. | | | | | | | | | Tax Deeds |
| 6 | 10 | 38 | 20 | 3.18 | Jan. 5, 1876 | 22 | Jan. 18, 1876 | 6 | Sale 1889-91-92 |
| 1 | 19 | 37 | 22 | 36.66 | June 5, 1878 | 9 | Jan. 5, 1881 | 4 | Jan. 6, 1881 |
| 5 | 18 | " | " | 45.72 | Mar. 19, 1878 | 8 | Jan. 5, 1881 | 5 | Feb. 20, 1879 |
| 6 | 18 | 37 | 22 | 51.67 | Mar. 19, 1878 | 8 | Jan. 5, 1881 | 5 | Feb. 20, 1879 |
| 7 | 18 | 37 | 22 | 61.59 | Mar. 19, 1878 | 8 | Jan. 5, 1881 | 5 | Feb. 20, 1879 |
| 6 | 13 | 37 | 22 | 5.44 | June 5, 1878 | 7 | Jan. 5, 1881 | 5 | Ass'd 1879 sold |
| 2 | 19 | 36 | 22 | .30 | Gov't ? | | | | |
| 3 | 30 | 36 | 22 | .37 | Gov't ? | | | | |
| 3 | 31 | 36 | 22 | 21.30 | May 15, 1878 | 25 | Mar. 12, 1884 | 12 | Jan. 30, 1879 |
| 5 | 24 | 36 | 21 | 16.20 | Dec. 14, 1894 | 13 | Dec. 18, 1894 | 3 | Tax 1895 paid |
| 6 | 24 | 36 | 21 | 2.22 | Oct. 12, 1904 | 5 | Oct. 12, 1904 | 2 | Ass'd 1905 sold |
| 7 | 24 | 36 | 21 | 2.20 | Gov't | | | | Tax 1905 paid |
| 3 | 23 | 36 | 21 | 25.70 | Dec. 14, 1894 | 13 | Dec. 18, 1894 | 3 | Tax 1895 paid |
| 3 | 26 | 36 | 21 | 30.00 | Dec. 14, 1894 | 13 | Dec. 18, 1894 | 3 | Tax 1895 paid |
| 4 | 25 | 36 | 21 | 14.60 | Dec. 14, 1894 | 14 | Dec. 18, 1894 | 4 | Tax 1895 paid |
| 5 | 6 | 35 | 22 | 1.57 | June 5, 1878 | 18 | June 5, 1878 | 8 | Jan. 30, 1879 |

**List of surveyed Islands &c in Menominee River bordering on Marinette Co: Wis.—Continued.**

| Surveyed Islands | Section | Town | Range | Acreage | Date of Entry | Number of all recorded transfers | Date of Earliest Transfer | Number of transfers during 10 yrs. after first transfer | Date when first taxes were paid to State of Wis. |
|---|---|---|---|---|---|---|---|---|---|
| Lot No. | | | | | | | | | Tax Deeds |
| 5 | 7 | 35 | 22 | 4.70 | Oct. 23, 1901 | 15 | Mar. 17, 1904 | 1 | Tax 1902 paid |
| 6 | 7 | 35 | 22 | 28.30 | May 28, 1878 | 23 | May 28, 1878 | 8 | Jan. 30, 1879 |
| 7 | 7 | 35 | 22 | 24.70 | May 28, 1878 | 23 | May 28, 1878 | 8 | Jan. 30, 1879 |
| 5 | 18 | 35 | 22 | 7.60 | Oct. 4, 1905 | 7 | July 29, 1904 | 1 | Tax 1906 paid |
| 6 | 18 | 35 | 22 | 2.30 | Oct. 23, 1901 | 8 | Mar. 17, 1904 | 1 | Tax 1906 paid |
| 5 | 19 | 35 | 22 | 1.90 | Feb. 25, 1884 | 12 | Apr. 17, 1897 | 5 | Ass'd 1884 sold |
| 4 | 30 | 35 | 22 | 1.30 | Feb. 25, 1884 | 8 | May 6, 1896 | 0 | Ass'd 1884 sold |
| 3 | 35 | 35 | 21 | 1.46 | Govt. ? | | | | |
| 4 | 35 | 35 | 21 | 9.20 | Gov't ? | | | | |
| 4 | 36 | 35 | 21 | .23 | Gov't. ? | | | | |
| 5 | 36 | 35 | 22 | .17 | Gov't ? | | | | |
| 6 | 36 | 35 | 21 | .97 | Gov't ? | | | | |
| 7 | 36 | 35 | 21 | 4.58 | Gov't. ? | | | | |
| 8 | 36 | 35 | 21 | 1.70 | Gov't. ? | | | | |
| 9 | 36 | 35 | 21 | .73 | Gov't. ? | | | | |
| 10 | 36 | 35 | 21 | 1.28 | Gov't. ? | | | | |
| 11 | 36 | 35 | 21 | 4.00 | Gov't. ? | | | | |
| 12 | 36 | 35 | 21 | .77 | Gov't. ? | | | | |

**List of surveyed Islands &c in Menominee River bordering on Marinette Co. Wis.—Continued.**

| Surveyed Islands | Section | Town | Range | Acreage | Date of Entry | Number of all recorded transfers | Date of Earliest Transfer | Number of transfers during 10 yrs. after first transfer | Date when first taxes were paid to State of Wis. |
|---|---|---|---|---|---|---|---|---|---|
| Lot No. | | | | | | | | | Tax Deeds |
| 13 | 36 | 35 | 21 | 13.50 | Gov't. ? | | | | |
| 14 | 36 | 35 | 21 | 1.20 | Gov't. ? | | | | |
| 3 | 2 | 34 | 21 | 3.70 | Feb. 25, 1884 | 5 | May 23, 1898 | 4 | Tax 1884 paid |
| 4 | 3 | 34 | 21 | 3.30 | June 3, 1863 | 18 | May 17, 1893 | 4 | Tax 1869 Delinqt. |
| 5 | 10 | 34 | 21 | 24.50 | June 3, 1864 | 11 | Apr. 7, 1892 | 6 | Tax 1867 Redeemed |
| 4 | 15 | 34 | 21 | 1.30 | Feb. 25, 1884 | 3 | Apr. 16, 1896 | 2 | Ass'd 1885 sold |
| 5 | 33 | 34 | 21 | .80 | July 22, 1885 | 1 | | | Ass'd 1886 sold |
| 2 | 4 | 33 | 23 | 5.20 | Feb. 25, 1884 | 15 | May 17, 1897 | 7 | Tax 1884 paid |
| 3 | 4 | 33 | 23 | 7.20 | Feb. 25, 1884 | 15 | May 17, 1897 | 7 | Tax 1884 paid |
| 2 | 8 | 33 | 23 | .37 | Oct. 11, 1861 | 2 | Dec. 17, 1861 | 1 | Tax 1876 paid. |
| 5 | 17 | 33 | 23 | 9.38 | Oct. 11, 1861 | 2 | Dec. 17, 1861 | 1 | Tax 1866 paid |
| | | | | | | | | | Tax 1870 Delq. |
| 4 | 30 | 33 | 23 | 15.10 | June 12, 1868 | 18 | Mar. 26, 1877 | 4 | Tax 1872 paid |
| | | | | | | | | | Tax 1872 paid |
| 2 | 31 | 33 | 23 | 1.90 | June 15, 1868 | 13 | July 6, 1896 | 5 | Tax 1872 paid |
| 6 | 4 | 33 | 21 | 2.70 | Feb. 25, 1884 | | | | Never Assessed |
| 5 | 1 | 32 | 22 | 7.47 | Mar. 28, 1857 | 19 | June 1, 1864 | 4 | Tax Deed 1861 Sale |
| 6 | 1 | 32 | 22 | 23.64 | Mar. 28, 1857 | 19 | June 1, 1864 | 4 | Tax Deed 1861 Sale |

**List of surveyed Islands &c in Menominee River bordering on Marinette Co. Wis.—Continued.**

| Surveyed Islands Lot No. | Section | Town | Range | Acreage | Date of Entry | Number of all recorded transfers | Date of Earliest Transfer | Number of transfers during 10 yrs. after first transfer | Date when first taxes were paid to State of Wis. |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | Tax Deeds |
| 7 | 1 | 32 | 22 | 39.58 | Mar. 28, 1857 | 19 | June 1, 1864 | 4 | Tax Deed 1861 Sale |
| 4 | 12 | 32 | 22 | 13.25 | Mar. 28, 1857 | 19 | June 1, 1864 | 4 | Tax Deed 1861 Sale |
| 5 | 32 | 31 | 23 | .21 | Feb. 18, 1866 | 10 | May 14, 1866 | 1 | Tax 1867 Redeemed |
| 6 | 32 | 31 | 23 | 1.29 | Feb. 18, 1866 | 10 | May 14, 1866 | 1 | Tax 1867 Redeemed |
| 7 | 32 | 31 | 23 | 7.70 | Mar. 2, 1857 | 10 | July 10, 1866 | 2 | Tax 1864 paid |
| 1 | 33 | 31 | 23 | 2.90 | Oct. 10, 1855 | 13 | Mar. 12, 1856 | 2 | Tax 1864 paid |
| | | | | | | | | | Tax D. Sale 1864 |
| 2 | 33 | 31 | 23 | 1.68 | Oct. 10, 1855 | 5 | May 24, 1867 | 4 | Tax 1869 paid |
| 3 | 33 | 31 | 23 | 1.74 | Feb. 18, 1864 | 5 | May 14, 1866 | 1 | Tax 1867 Redeemed |
| 5 | 1 | 30 | 23 | 1.30 | May 11, 1858 | 17 | May 27, 1858 | | Tax 1859 Redeemed |
| 6 | 1 | 30 | 23 | .61 | May 11, 1858 | 17 | May 11, 1857 | | Tax 1859 Redeemed |
| 5 | 6 | 30 | 24 | 35.50 | Oct. 1, 1855 | 27 | May 27, 1856 | 6 | Tax 1864 paid |
| 6 | 6 | 30 | 24 | 2.30 | May 28, 1856 | 33 | July 23, 1856 | 3 | Tax 1864 paid |
| 7 | 6 | 30 | 24 | 7.26 | Oct. 10, 1855 | 23 | Feb. 5, 1857 | 5 | Tax 1864 paid |
| 8 | 6 | 30 | 24 | .56 | Oct. 9, 1853 | 12 | May 14, 1866 | 1 | Tax 1869 paid |
| 2 | 5 | 30 | 24 | 21.80 | Oct. 1, 1855 | 44 | May 27, 1856 | 6 | Tax 1866 paid |
| 2 | 23 | 31 | 21 | .80 | Gov't. ? | | | | |

**Wisconsin Exhibit 337**

| Lot | S | T | R | Date of Entry | Years of Taxation at intervals of 10 years from entry | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| 6 | 10 | 38 | 20 | 1- 5-76 | 1888<br>Deeded<br>Sale 1889 | 1898<br>Paid | 1908<br>Paid | 1918<br>Paid | ..... | 1923<br>Can't find |
| 1 | 19 | 377 | 22 | 6- 5-78 | 1880<br>Paid | 1890<br>Can't find | 1900<br>Not Ass'd | 1911<br>Paid | 1920<br>Paid | 1923<br>Sold |
| 5 | 18 | 37 | 22 | 3-19-78 | 1878<br>Paid | 1888<br>Can't find | 1898<br>Not Ass'd | 1908<br>Paid | 1918<br>Paid | 1923<br>Sold |
| 6 | 13 | 37 | 21 | 6- 5-78 | 1879<br>Sold | 1889<br>Can't find | 1909<br>Not Ass'd | 1919<br>Paid | ..... | 1923<br>Not Ass d |
| 3 | 31 | 36 | 22 | 5-15-78 | 1879<br>Paid | 1888<br>Can't find | 1898<br>Paid | 1908<br>Paid | 1918<br>Paid | 1923<br>Paid |
| 5 | 24 | 36 | 21 | 12-14-94 | 1895<br>Paid | 1905<br>Sold | 1915<br>Paid | ..... | ..... | 1923<br>Sold |
| 3 | 23 | 36 | 21 | 12-14-94 | 1895<br>Paid | 1905<br>Sold | 1915<br>Paid | ..... | ..... | 1923<br>Paid |
| 3 | 26 | 36 | 21 | 12-14-94 | 1895<br>Paid | 1905<br>Sold | 1915<br>Paid | ..... | ..... | 1923<br>Sold |
| 4 | 25 | 36 | 21 | 12-14-94 | 1895<br>Paid | 1905<br>Sold | 1915<br>Paid | ..... | ..... | 1923<br>Sold |
| 5 | 6 | 35 | 22 | 6- 5-78 | 1878<br>Paid | 1888<br>Can't find | 1898<br>Paid | 1908<br>Paid | 1918<br>Paid | 1923<br>Paid |

**Wisconsin Exhibit 337—Continued.**

| Lot | S | T | R | Date of Entry | Years of Taxation at intervals of 10 years from entry | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| 5 | 7 | 35 | 22 | 10-23-01 | 1902<br>Paid | 1912<br>Paid | 1922<br>Paid | | | 1923<br>Paid |
| 5 | 18 | 35 | 22 | 10- 4-05 | 1906<br>Paid | 1916<br>Paid | | | | 1923<br>Paid |
| 5 | 19 | 35 | 22 | 2-25-84 | 1884<br>Sold | 1894<br>Sold | 1904<br>Can't find | 1914<br>Sold | | 1923<br>Not Ass'd |
| 4 | 30 | 35 | 22 | 2-25-94 | 1884<br>Sold | 1894<br>Not Ass'd | 1904<br>Not Ass'd | 1914<br>Sold | | 1923<br>Not Ass'd |
| 3 | 2 | 34 | 21 | 2-25-84 | 1884<br>Paid | 1894<br>Sold | 1904<br>Paid | 1914<br>Paid | | 1923<br>Sold |
| 4 | 3 | 34 | 21 | 6- 3-63 | 1879<br>Paid | 1889<br>Not Ass'd | 1899<br>Paid | 1909<br>Sold | 1919<br>Sold | 1923<br>Sold |
| 5 | 10 | 34 | 21 | 6- 3-64 | 1879<br>Paid | 1889<br>Sold | 1899<br>Paid | 1909<br>Paid | | 1923<br>Sold |
| 4 | 15 | 34 | 21 | 2-25-84 | 1885<br>Sold | 1895<br>Not Ass'd | 1905<br>Not Ass'd | 1915<br>Not Ass'd | | 1923<br>Not Ass'd |
| 5 | 33 | 34 | 21 | 7-22-85 | 1886<br>Sold | 1896<br>Not Ass'd | 1906<br>Not Ass'd | 1916<br>Not Ass'd | | 1923<br>Not Ass'd |
| 2 | 4 | 33 | 23 | 2-25-84 | 1884<br>Paid | 1894<br>Sold | 1904<br>Paid | 1914<br>Paid | | 1923<br>Paid |
| 2 | 8 | 33 | 23 | 10-11-61 | 1879<br>Paid | 1889<br>Not Ass'd | 1899<br>Paid | 1909<br>Paid | 1919<br>Paid | 1923<br>Paid |
| 5 | 17 | 33 | 23 | 10-11-61 | 1879<br>Paid | 1889<br>Paid | 1899<br>Paid | 1909<br>Paid | 1919<br>Paid | 1923<br>Paid |

**Wisconsin Exhibit 337—Continued.**

| Lot | S | T | R | Date of Entry | Years of Taxation at intervals of 10 years from entry | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| 4 | 30 | 33 | 23 | 6-12-68 | 1879<br>Paid | 1889<br>Paid | 1899<br>Paid | 1909<br>Sold | 1919<br>Paid | 1923<br>Paid |
| 2 | 31 | 33 | 23 | 6-15-68 | 1879<br>Paid | 1889<br>Paid | 1899<br>Sold | 1909<br>Sold | 1919<br>Paid | 1923<br>Sold |
| 6 | 4 | 33 | 21 | 2-25-84 | Apparent | ly never asses sed | | | | |
| 5 | 1 | 32 | 22 | 3-28-57 | 1879<br>Paid | 1889<br>Paid | 1899<br>Paid | 1909<br>Paid | 1919<br>Paid | 1923<br>Paid |
| 4 | 12 | 32 | 22 | 3-28-57 | 1879<br>Paid | 1889<br>Paid | 1899<br>Paid | 1909<br>Paid | 1919<br>Paid | 1923<br>Paid |
| 5 | 32 | 31 | 23 | 2-18-66 | 1879<br>Paid | 1889<br>Paid | 1899<br>Paid | 1909<br>Paid | 1919<br>Paid | 1923<br>Paid |
| 1 | 33 | 31 | 23 | 10-10-55 | 1879<br>Paid | 1889<br>Paid | 1899<br>Paid | 1909<br>Paid | 1919<br>Paid | 1923<br>Paid |
| 5 | 1 | 30 | 23 | 5-11-58 | 1879<br>Paid | 1889<br>Can't find | 1899<br>Can't find | 1909<br>Can't find | 1919<br>Can't find | 1923<br>Can't find |
| 5 | 6 | 30 | 24 | 10- 1-55 | 1879<br>Paid | 1889<br>Paid | 1899<br>Paid | 1909<br>Paid | 1919<br>Paid | 1923<br>Paid |
| 2 | 5 | 30 | 24 | 10- 1-55 | 1879<br>Paid | 1889<br>Paid | 1899<br>Paid | 1909<br>Paid | 1919<br>Paid | 1923<br>Paid |

**Legal proceedings successfully invoked in respect to islands.**

From time to time there have been difficulties over the islands in question, notably in 1876, when a controversy arose between persons floating logs down the Menominee River. Under date of June 7, 1876, one B. J. Brown wrote to the then Governor of the state, stating that,

> "The main channel of the river is on the Wisconsin side of the island. All of the old residents agree in this and it is susceptible of conclusive and overwhelming proof. It is deeper, wider—has the more rapid current—passes the larger volume of water. It was the old steamboat and raft channel. The boundary of Michigan is defined in her Constitution to be 'down the center of the main channel' of the Menominee River. That is the boundary unless it has in some way been changed.
>
> Wisconsin asserts jurisdiction over the Island as I suppose.
>
> 1st By force of sec's 2-3 of 'an Act to enable the people of Wisconsin to form a Constitution' etc. Approved August 6th, 1846.
>
> As to assent on part of Michigan required by Sec. 2. The Secretary of State has written me that he cannot find that Michigan ever assented. To the same effect is a letter from the Acting Commr of the Genl Land Office & from Hon. C. I. Walker Detroit * * *
>
> The islands south of, or whether below, the Quinnesec Falls were inclosed by the Surveyor General within the limits of the Menasha Wisconsin Land District. I have seen his original instructions dated in 1854 or 1855. He merely assumes that all these islands—that is below the Quinnesec are in Wisconsin.
>
> They were entered there.

The question of jurisdiction arises in this case. The sheriff of Oconto County Wisconsin is endeavoring to execute a writ of Attachment upon certain logs as they are discharged from the mouth of the boom at the head of

the Island. He has a force of 15 men there this afternoon & threatens to arrest our sheriff if he comes upon the Island.

* * *

* * What I wish is that you will authorize the sheriff of Menominee County to employ a sufficient force at the expense of the state, to execute his process in Michigan—allowing him to determine whether he is within the limits of the county or not."[74]

On June 13, 1876, the Attorney General of Michigan advised the then Governor, with reference to the foregoing communication, that the controversy referred to involved apparently a difficulty as to the jurisdiction of the states in question over some islands in the river. He fully outlined the situation, showing that he understood just what Wisconsin's claim was, and recommended methods by which the jurisdiction could be tested. On June 14, Brown again advised the Governor that the islands referred to in his former letter had been taxed in Wisconsin.[75] So far as the records indicate, the controversy ended here, and as shown by the letter of Mr. Brown, under date of June 14, 1876, the Wisconsin sheriff was then "reducing the logs into his possession as they come from the mouth of the boom," just as he was doing on the 7th day of June, 1876. How long this action on the part of the sheriff continued, no one knows. Apparently, however, he successfully carried out his undertaking, and the island has continued to be taxed in the state of Wisconsin. Michigan has offered no proof to the contrary.

**Michigan admits taxation and possession by Wisconsin.**

In fact she admits that all territory claimed by Wisconsin has been taxed in Wisconsin, just as is shown by the exhibits above referred to.

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[74] Wisconsin Exhibit 366.

[75] Wisconsin Exhibit 366.

**No claim ever made by Michigan to islands.**

In spite of the situation disclosed by the record, Michigan claims she was not advised of Wisconsin's claim to the islands. This, in spite of the fact that for over fifty years Wisconsin asserted a claim to these islands, and that for nearly fifty years she has apparently defied the state of Michigan in this respect, after Michigan had full notice of Wisconsin's claims. As shown by Wisconsin Exhibits 336 and 337, repeated transfers of these islands have been made, running all the way from 44 down to 2, and extending from 1853 down to the present time. If Michigan ever considered claiming these islands, she cannot justify her failure to do so because of lack of knowledge as to the exact situation with respect to these islands or of the claim of Wisconsin thereto. No one has misled Michigan as to them.

So far as the record in this case shows, the public officials of Michigan, as well as the people of Michigan, do not today lay any claim to the islands in question. As is pointed out in this brief, the constitutional convention of 1907 referred only to the disputed area, which was the Montreal River section, that being the only subject discussed in the convention. No other area was in dispute. The act of 1919, creating the boundary commission, and the act of 1921, extending its powers, in no way indicate that the State of Michigan intends to make any claim to the islands in the Menominee River, but directs that commission to confine its efforts to the "disputed area", and since that time no authority to make such a claim has been shown in the record. From this it must be assumed that Michigan still officially accepts the position she took in 1850, that is, abiding by the settlement of the boundary line controversy proposed by her representatives in 1846, accepted by the delegate of Wisconsin and incorporated into the boundary line definition of Wisconsin. So far as the record in this case shows, no one but the attorneys

for the plaintiff has ever made a claim to the islands in the Menominee River contrary to the disposition thereof made by the Wisconsin Enabling Act in 1846.

During the period covered by the foregoing events, the conditions along the Menominee River existing at the time when the boundary was first described, were entirely changed. The forests which furnished millions of feet of lumber were cut down and the lumber floated down the river, new channels were cut, and logs became lodged in the bottoms of the channels to such an extent that it can not now be determined exactly what the conditions were in 1836. These conditions exist in the vicinity of islands.[76] Ten dams have been built in the Menominee River, the combined backwaters of which extend thirty and one-half miles up the river.[77] In the pondage area of these dams the former channel can no longer be determined because the channels have been obliterated, the heads on some of the dams being 70 feet or more high. In some instances the power houses are so located that they extend out over the channel, and numerous islands are within the pondage areas of the dams.[78] Because of these conditions the course of the main channel of the Menominee River cannot now be determined with any degree of certainty with respect to the islands so affected.

As the undisputed evidence in the record shows, numerous islands have been flooded by the backwater of the dams above referred to.[79] Title to these islands was acquired on the theory that they properly belonged to the jurisdiction of Wisconsin. If it should now be held that the islands so flooded were erroneously surveyed as being in Wisconsin, what will be the rights of companies which have invested millions of dollars in dams in reliance upon their title to the lands in the

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[76] R. p. 800–802.
[77] R. p. 798, 799.
[78] R. p. 800–801, 820.
[79] R. p. 800–802.

pondage area? The titles acquired would, of course, be cancelled with the surveys. From the very nature of things, and especially because of the usage to which these islands are now being put, it would undoubtedly follow that they are swamp lands, title to which would immediately vest in the State of Michigan under the Swamp Lands Act of 1850. The inevitable result of such a situation would be that the owners of the dams, who in good faith have proceeded to improve the river in reliance upon the universally accepted understanding that Michigan was not making any claim to these islands, will be confronted with the necessity of applying to the legislature of Michigan for relief, without any guarantee that such relief will be granted. Suppose it is not granted, what will be the rights of these power companies under the circumstances? It is unnecessary to answer that query. The suggestion of it is sufficient to impress upon the Court the innumerable complications that will follow and the endless litigation that might result if Michigan were to prevail in her claim to the islands.

In addition, the titles now existing must be cancelled and extinguished because they will not embrace descriptions existing after such cancellations and re-surveys are completed, for the reason that the Michigan surveys do not correspond with the Wisconsin surveys. Titles which have existed since 1853 must be scrapped and a new order of things created. Clouds will thus be cast on all these titles, and a scramble by new claimants will ensue to acquire the titles, or an act of Congress, or both state legislatures will be required to save the titles of the present owners. None of them are parties to this suit, none of them can be protected by any decree herein. How will tax officials in the various municipalities to which these islands now belong be persuaded to relinquish their rights? If they refuse, before the quiet and repose now incident to the titles held during all these years will be restored, these owners must resort to expensive law suits, expensive to the extent of exceeding the actual value of the parcels. Suppose no legis-

lation is passed to protect present owners; when the new surveys are approved ambitious land grabbers will attempt to "jump" these new claims. They will be met by the present owners and occupants and thus more litigation will result; blood may even be shed. The amount of confusion that will follow is only limited by the limits of the resourcefulness and inventiveness of those ambitious to acquire these islands at the expense of those who have by their labor and sacrifice, throughout a period exceeding fifty years, made them valuable and desirable.

## GREEN BAY SECTION.

To support our argument relative to recognition and acquiescence in this region, we rely upon the following facts:

(1) Wisconsin has in all respects asserted sovereignty and exercised jurisdiction over the islands of Green Bay from the time she became a state until the present day.

(2) The United States government has recognized the boundary as claimed by Wisconsin, from 1836 until the present time.

(3) The State of Michigan has never, up to the time of the commencement of this suit, indicated the slightest dissent from Wisconsin's claims, and has never asserted sovereignty or exercised jurisdiction over any part of the disputed territory.

(4) Michigan has at all times been sufficiently informed of her rights, and her acquiescence therefore binds her.

We shall consider these propositions in the order stated.

### Acts of Dominion by Wisconsin

Wisconsin became a state in the year 1848. The enabling act, the act admitting Wisconsin as a state, and her own Constitution of 1848, which is in force to-day, all describe the

boundary in this section as "running with the boundary line of the State of Michigan." These acts do not aid in the solution of the present controversy.

Between the years 1836 and 1848 Wisconsin was a territory, the territorial government having been created about two months prior to the passage of the Michigan Enabling Act.[1] The Territory of Wisconsin promptly assumed jurisdiction over Washington Island, and we find that as early as 1841 the Territory taxed lands on the island, and in every year from 1841 to 1848 sold land on the island for nonpayment of taxes.[2]

The record contains affirmative proof that the State of Wisconsin taxed lands on Washington Island as early as 1853.[3] Michigan's witness Martin Knudsen testified that he had paid taxes to Wisconsin on his property on Washington Island since the '70s.[4]

In 1855 the Town of Washington, consisting of Washington, Rock, Plum and Detroit Islands, was organized by special act of the Wisconsin legislature.[5]

In the same year, 1855, a census was taken of the inhabitants of Wisconsin, and we find that the inhabitants of the Town of Washington were included in Door county, Wisconsin. The census showed 190 male and 120 female inhabitants of the town.[6]

Wisconsin Exhibit 43 is a copy of certain of the election records on file in the office of the Secretary of State of Wisconsin. From these it appears that in November, 1858, an election was held and that the inhabitants of Washington Island voted for member of Congress and on the question of amending the banking law of Wisconsin. Their votes were canvassed by

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[1] See pp. 49, 84 of this brief.
[2] Wisconsin Exhibit 334, R. pp. 460–463.
[3] Wisconsin Exhibit 371.
[4] R. p. 62.
[5] Wisconsin Exhibit 362, p. 10.
[6] Wisconsin Exhibit 335; R. p. 463.

the County Board of Canvassers of Door County, Wisconsin. In the same exhibit, we observe that in 1861 a judicial election was held, and that inhabitants of the Town of Washington voted for candidates for judge of the Tenth Judicial Circuit of Wisconsin.

During the Civil War the draft was resorted to for the raising of troops, and we find that the Adjutant General of Wisconsin drafted six men and recruited six from the sub-district of Washington, Door County, Wisconsin.[7]

Michigan's witness Martin Knudsen testified that he was elected a justice of the peace of Door County, Wisconsin. in the '70s.[8]

Bert Carmody, Register of Deeds of Door County, Wisconsin, testified on behalf of Wisconsin that in 1924 he prepared a table of the number of transfers of lands on the disputed islands which had been recorded in his office. Wisconsin Exhibit 333 is the table prepared by him.[9] It appears from this table that there are on record 5,607 transfers of lands on Washington and Rock Islands. All of these transfers were made under the jurisdiction of Wisconsin.

It appears from the above evidence that Wisconsin has asserted sovereignty and jurisdiction over the disputed territory since the beginning of her statehood, and that the Territory of Wisconsin assumed the same attitude prior thereto.
far as appears in the record, considered them as being in Michigan.

That the United States has been well informed in the prem-

### Acts of Recognition by the United States

The United States government has consistently recognized the disputed islands as being in Wisconsin, and has never, so

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[7] Wisconsin Exhibit 42.
[8] R. p. 62.
[9] R. pp. 460–462.

ises is apparent from the facts (1) that Captain Cram, in his first report, called the attention of the government to the uncertainty of the boundary in the Green Bay region;[10] (2) that the government spent about $9,000 in the '40s to survey the Green Bay channel in accordance with Cram's recommendation, and that a careful survey was made;[11] (3) that additional elaborate surveys were made in the '60s.[12]

It is clear from this evidence that the government was fully informed, and that its acts of recognition were done advisedly.

The first such act to which we call the Court's attention was the inclusion of the disputed territory in the public surveys of lands in Wisconsin. According to the Surveyor General's official map of the public surveys in Wisconsin, it appears that the islands were surveyed as part of that Territory as early as the year 1837.[13] Farmer's map of 1856 shows by the designation of township lines that even in that year the lands were either surveyed or designated for survey in Wisconsin.[14] Wisconsin Exhibits 193 to 196, inclusive, are official sketches of the public surveys in Wisconsin, dated, respectively, 184__,

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[10] Michigan Exhibit 15, pp. 8–9.

[11] Wisconsin Exhibit 65 contains the following statement:

"* * * The several acts of Congress making appropriations for the western boundary survey were as follows: Act of June 12, 1838, appropriated $3,000; the Act of March 3, 1841, $6,000; the Act of May 18, 1842, $7,000, and the Act of August 10, 1846, the sum of $1,000. The reports indicate, however, that only $7,613.97 were expended by Capt Cram on that portion of the boundary between the south of the Menomonee River and Lake Superior. Of the above appropriations, aside from the amount paid pertaining to the land boundary, including $1,000 paid W. A. Burt, the balance appears to have been expended in determining the ship channel in Green Bay."

The results of the survey are found, in part, in maps shown as Michigan Exhibits 97 and 99.

[12] Michigan Exhibits 100, 101 and 102.

[13] Wisconsin Exhibit 182.

[14] Michigan Exhibit 86.

1851, 1866 and 1878, all of which show the islands surveyed in Wisconsin.[15]

On the other hand, it affirmatively appears that the disputed islands were never surveyed as part of the public lands in Michigan. Wisconsin Exhibits 185 to 192, inclusive, are official sketches of the public surveys in Michigan, dated respectively 184__, 1851, 1852, 1855, 1857, 1866, 1878 and 1888. These maps all show that the islands were not included in the Michigan surveys. In the 1855 map, the state boundary has been drawn in as a heavy white line, passing north of Rock Island.[16] In the 1888 map, compiled by the General Land Office of the United States, the state boundary is shown as a broken dash-dot line passing through the Rock Island channel.[17]

Wisconsin Exhibits 199 and 200 are official maps published by the United States Geological Survey in 1922, from data compiled in 1910 and 1911. These maps of Michigan and Wisconsin, respectively, show the disputed islands in Wisconsin.

The United States Lake Survey, in its Bulletin of 1924, refers to Rock Island and Washington Island as in Wisconsin,[19] and its charts do the same.[20]

The exhibits above referred to are typical instances of recognition by the United States of the boundary as claimed by Wisconsin. There is not a single instance in the record or elsewhere, so far as we have been able to find, where the

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[15] Other maps showing the same thing are Tanner's Map, 1839, (Michigan Exhibit 12); Burr's Map, 1841 (Wisconsin Exhibit 134); Mitchell's Map, 1846 (Michigan Exhibit 43); De Silver's Map, 1857 (Wisconsin Exhibit 147); and a sketch of the public surveys some time subsequent to 1842, which appears as Michigan Exhibit 44.

[16] Wisconsin Exhibit 188.

[17] Wisconsin Exhibit 192, R. pp. 710–711.

[19] Wisconsin Exhibit 330, p. 3.

[20] See, for instance, Michigan Exhibit 114.

United States has considered the islands as being in Michigan, or has even indicated doubt upon the question.

### General Recognition

That the disputed islands are in Wisconsin has been recognized not only by the parties to this lawsuit and by the United States government, but by the world at large. We have seen no map nor any document, formal or informal, official or private, showing these islands as part of the State of Michigan. There are countless references, in publications of all sorts, to the islands as being in Wisconsin; and there are numberless maps showing them there. Among the unofficial maps in the record of this case which affirmatively place the islands in Wisconsin are Michigan Exhibits 59, 86 and 175, and Wisconsin Exhibits 181, 183 and 395.

### Acts of Recognition and Acquiescence by Michigan

From the earliest day until the commencement of this suit, the State of Michigan has in every possible way acquiesced in Wisconsin's assertion of sovereignty and jurisdiction over the disputed islands. In all of her constitutions and proposed constitutions, including that of 1907, she has refrained from making any alteration whatsoever in the description of that part of the boundary passing through the waters of Green Bay.[21] In none of the correspondence which is in the record relative to the boundary at the time the dispute first threatened to come to a head about twenty years ago, is there any suggestion of a doubt on the part of the Michigan officials relative to the correctness of the Green Bay section of the boundary.[22] It is impossible to conceive how the State of Michigan could have acquiesced more completely in Wiscon-

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[21] See Wisconsin Exhibits 32, 33, 39 and 40.

[22] See Michigan Exhibits 64 to 74, inclusive.

sin's claims than she has done up until the commencement of this lawsuit, two years ago.

It may well be argued that the people of Michigan and her public officials are to this day acquiescing in Wisconsin's claims so far as the Green Bay islands are concerned, and that the inclusion of those islands in the present action was a pure mistake or at least an unauthorized act on the part of the Special Counsel for the State. We base this suggestion upon the provisions of the acts of the Michigan legislature of 1919 and 1921, which are shown as Plaintiff's Exhibit 106. The act of 1919 created a commission "to investigate the *disputed* boundary line".[23] The act of 1921 amended the 1919 act and again referred to "the disputed boundary line." Now it is perfectly clear that until a time subsequent to the year 1921 there had never been any public suggestion of any dispute whatsoever concerning the Green Bay boundary, at least so far as appears in the record of this case. It may therefore be argued with considerable force that the boundary commission created by the above mentioned acts of the legislature had no authority to do anything about the Green Bay boundary, being confined to investigation and prosecution of this action with reference to the Montreal and Menominee sectors only.

We have no desire to insist upon this proposition, but we do think it worthy of note as an indication that the legislature of Michigan and the people of the State have never ceased to acquiesce contentedly in Wisconsin's claim to the Green Bay islands.

**Michigan's Acquiescence not Excusable on Ground of Mistake**

As we understand Michigan's position, she concedes that she has continuously acquiesced in Wisconsin's claims to the disputed islands, but maintains that her acquiescence should

[23] Italics ours.

not bind her because she has been ignorant of her rights and misled in relation thereto. In answer to this claim, we propose to show that Michigan has been fully informed in the premises from the very beginning, and has no excuse whatsoever for not having asserted her claim eighty-five years ago.

SCHOOLCRAFT'S ACTIVITIES.

Under this head, we call the Court's attention first to the evidence in the record concerning the activities of Henry Rowe Schoolcraft. Schoolcraft was a resident of Michigan Territory for a great many years, was a highly intelligent man, and while best known as a writer on Indian history and customs, was an ardent servant of the interests of his Territory and State in many ways. In 1920 Mr. Schoolcraft, in company with Governor Cass of Michigan Territory, took an extensive journey in the Upper Peninsula of Michigan, and in the course of his travels of that year coasted along the entire lake boundary of the peninsula, including Green Bay.[24] Schoolcraft's memoirs show that his travels were not hasty and that he was a careful observer of geographical facts.[25] The extent of his information relative to the geography of the upper peninsula is well shown in his letter of 1836 to Senator Norvell.[26]

We have already referred to the Indian Treaty of 1836, whereby the Ottawa and Chippewa Indians ceded to the United States a large tract of land bounded, in part, by "the ship channel into Green Bay."[27] We have also referred to the official interpretation of this boundary as passing through

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[24] Wisconsin Exhibit 79, p. 1. The course taken by Schoolcraft at that time is shown by a dotted line on the map appearing in the record as Wisconsin Exhibit 161.

[25] See, for instance, Michigan Exhibit 83.

[26] Michigan Exhibit 41.

[27] See p. 247 of this brief.

the Rock Island channel.[28] The significance of this treaty and boundary in the present connection is that the treaty was negotiated on behalf of the United States by this same Henry R. Schoolcraft.[29] Thus, Mr. Schoolcraft had his attention called to the question of the ship channel into Green Bay in the very year when the Michigan boundary was being established.

The fact assumes still further significance when it is observed that in the spring of that year, 1836, Schoolcraft appeared before the Senate Judiciary Committee by request, to impart information on the geography of the Lake Superior region for the assistance of the committee in its consideration of the Michigan boundary question, which was then before it.[30] It will be recalled that this committee's deliberations resulted in the Michigan Enabling Act, the boundary provision of which is now in dispute.

It further appears that Schoolcraft was not only well informed and active in communicating his information to others, but that he was very anxious to get for Michigan all the territory that was possible, and was busily working to that end. See his letter of February 20, 1836, to Lucius Lyon,[31] in which he suggests various schemes of procuring more and richer territory for Michigan.

Thus it appears that one of Michigan's most prominent citizens was called upon to assist the Senate Judiciary Committee in determining upon the boundary of Michigan; that he was well informed as to the geography of the region in general, and the feasibility of the ship channel as a boundary, in particular, and that he was anxious to get as much for Michigan as he could. This evidence alone is sufficient to discredit any claim by Michigan that she has been excusably ignorant of her rights.

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[28] See brief, pp. 247–251.
[29] Wisconsin Exhibit 329.
[30] Michigan Exhibit 42.
[31] Quoted in Michigan Exhibit 40.

LYON'S KNOWLEDGE.

We next refer to Lucius Lyon, who was former Territorial Delegate to Congress from Michigan, and who was in the spring of 1836, Senator-designate from the proposed state. Lyon, like Schoolcraft, was extensively informed in regard to the geography of Michigan and Wisconsin, and, like Schoolcraft, was eager and active to get for Michigan as much as possible, regardless of any just or reasonable claims which the State might have. This attitude on the part of Lyon has been adverted to in an earlier part of this brief and we shall not discuss it in detail here. What we wish to emphasize at this point is that Lyon's attention was expressly directed to the question of the boundary in the Green Bay region. This is shown by his letters of February 21, 1836 to Colonel Andrew Mack and to State Senator Charles C. Hascall,[33] in each of which Lyon states that he believes Congress will establish the boundary along "the main ship canal into Green Bay." Lyon's use of the word "main" shows that he knew of or suspected the existence of more than one channel. We may rest assured, from what appears in the record concerning Lyon's grasping tendencies, that he was not the man to let Michigan be deprived of any island which she had the slightest chance to acquire.

TERRITORIAL LEGISLATURE'S KNOWLEDGE.

The third obstacle to Michigan's claim of justifiable ignorance is the fact that in January, 1836, the Legislative Council of the Territory of Michigan met at Green Bay for its annual session.[34] It is obvious that the territorial solons must have proceeded to the seat of their labors by boat,

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[33] Quoted in Wisconsin Exhibit 332, pp. 2–4, and in Colonel Martin's testimony, R. pp. 673–674.

[34] Michigan Exhibit 57, pp. 12–13.

and that in doing so they passed through one of the channels into Green Bay. Thus they gained, or should have gained, a general knowledge of the geography of the region, and of the fact that there were several channels into the bay and several islands between them. This was clearly official notice of the possibility of a boundary dispute, and renders the present claim of justifiable mistake wholly groundless.

CRAM'S REPORTS.

We come now to the official reports of Captain Cram. His first report, rendered in 1841 and published as a Senate document, calls attention in the most emphatic terms to uncertainty in the Green Bay boundary. We quote the following from the report:[35]

> "After descending the channel of the Menomonee 'to the centre of the most usual ship-channel of the Green Bay of Lake Michigan,' the boundary is made to run 'thence through the centre of the most usual ship-channel of Green Bay, to the middle of Lake Michigan.'
>
> From map No. 4, which accompanies this report, it may be inferred that the islands which are in the eastern part of Green Bay would cause several ship channels. It is a well-known fact to all who have any personal knowledge of the navigation of this bay, that there are at least two ship-channels, which are in use by all classes and kinds of craft that navigate the great lakes. It would be next to an impossibility to collect the testimony that would be necessary to decide the question, which of these is the 'most usual ship-channel of Green Bay?' And it is not easy to conceive any other mode (than by testimony) by which the 'most usual ship-channel' could be ascertained. But suppose this method of collecting testimony practicable; it might occur that all the evidence

[35] Michigan Exhibit 15, pp. 8–9.

that could be obtained on the subject would prove that one of these channels is just as much in use as the other; in which case, it would only be shown that there is no such thing as the 'most usual ship channel' in this part of the bay.

Although the term 'most usual ship channel' is used in the description of the boundary, still it is rather to be presumed that this term was intended to imply in the act of Congress the *best ship-channel* of all that may be found in that portion of Green Bay referred to. An equitable construction of the law would convey this idea; for, it is not to be presumed that, of two States bordering upon navigable ship-channels, either State would or could, in equity, claim to appropriate the best of these channels exclusively to herself.

If the interpretation of the term 'most usual ship channel,' implying the best ship-channel, be correct, it will be necessary to make a complete hydrographic survey of all the channels that exist in that portion of Green Bay east of the mouth of the Menomonee river, in order to discover the best ship-channel (if there be such) among all the ship-channels now in use in that part of the bay.

After this survey shall have been made, the particular channel along which the boundary shall run may be declared.

It is important to the interests of Michigan and Wiskinson that this part of the boundary be immediately ascertained, on account of the question of jurisdiction over the islands in the eastern part of the bay.

With the modifications now respectfully suggested, the description of the boundary would be to the following effect, to wit:

* * * thence following the centre of the extreme lefthand channel of the Menomonee river, down to the centre of the best ship-channel of the Green bay of Lake Michigan; thence following the centre of the best ship channel of Green bay, to the middle of Lake Michigan.' "

In map No. 4, accompanying the report, the various channels are indicated by dotted lines.[36]

In Captain Cram's second report, he did not reiterate his observations relative to the Green Bay region, but on the contrary he attached to his report a map, which he said had been compiled with care and exhibited "the whole route of the boundary, all the way through, from Green Bay of Lake Michigan, to Lake Superior,"[37] and which, as we have already noted in various connections, plainly shows the islands at the entrance of the Bay as part of Wisconsin. This was official notice that Captain Cram's doubts with regard to the Green Bay boundary had been dissipated, and was enough to put the State of Michigan on inquiry.

## LEGISLATURE'S RESOLUTIONS OF 1841.

We next invite attention to the three resolutions of the Michigan legislature which were adopted on February 2, 1841. These resolutions, as has been pointed out earlier in this brief, recite the uncertainty of the boundary and the necessity of a careful survey, and provide for the appointment of the State Geologist as a commissioner to represent Michigan in the making of the survey.[38] They show plainly that the Michigan legislature was aware, in 1841, that the boundary description was ambiguous and that there might be a dispute over its interpretation.

We turn, now, to the activities of Douglass Houghton. We have pointed out heretofore that Dr. Houghton was the State Geologist of Michigan, and that he was appointed in 1841 as Commissioner to represent the State in the adjust-

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[36] Michigan Exhibit 15.
[37] Michigan Exhibit 23, p. 6.
[38] Wisconsin Exhibit 31.

ment of the boundary, his appointment being made pursuant to the resolutions of the Michigan Legislature.[39].

HOUGHTON'S ACTIVITIES.

Dr. Houghton, like Schoolcraft and Lyon, was eager to get everything possible for Michigan.[40] He was also thoroughly familiar with the geography of northern Michigan. In 1839 he had made a detailed geological survey of the coast from Mackinac to the mouth of the Menominee and on the west side of the Door County peninsula. He visited and carefully noted Washington Island and Rock Island, and went out of his way to observe that the principal ship channel to Green Bay passed between Rock Island[41] and St. Martin's Island.[42] Thus, the existence and relative importance of the channels was definitely called to Houghton's attention in 1839.

In 1841, pursuant to his appointment as Boundary Com-

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[39] Pp. 61, 70 of this brief.

[40] This attitude is illustrated by the following passage from his letter of July 22, 1840, to Governor Woodbridge (Michigan Exhibit 16, p. 2):

> "As a subject which must, if not soon arranged cause our state much contention I would call your attention to the condition of the boundary line between our state and the Territory of Wisconsin. I have long known this boundary to be extremely defective, but a more close examination has shown it to be even worse than had been supposed. I have not the act which defines our boundary before me, and therefore cannot refer very minutely to it, but it will probably be sufficient to refer to the fact that the geography of the country is totally different from that exhibited by the map which was used in defining the boundary, and this difference is such that if the letter of the act be strictly followed Michigan will be the loser by several hundred square miles, and the country lost will embrace a portion of the most promising of the mineral district as also much that is valuable for the purposes of agriculture."

[41] Called Louse Island by Houghton.

[42] Wisconsin Exhibit 54.

missioner, Houghton accompanied Captain Cram's expedition, and made a geological survey from the mouth of the Montreal to Green Bay. In his official report of January 25, 1842, he makes the following statements:[43]

> "In connection with duties assigned me relative to the boundary line between our own state and Wisconsin, I have been enabled to complete a very perfect Geological section of nearly 180 miles in length, crossing from the mouth of Montreal river of Lake Superior, to the mouth of the Menominee river of Green Bay, a district highly interesting both in its geological and topographical features. This section crosses the upper peninsula somewhat further west than any of the sections I have heretofore made. * * *
>
> Under the provision of a joint resolution, approved February 2, 1841, I was instructed by the executive of the state, to act as commissioner upon the part of this state, in relation to the boundary line between Michigan and Wisconsin, and this duty has been performed so far as circumstances would permit the same to be done."

A few weeks prior to the making of this report, Houghton directed an official letter to John S. Barry, Governor of Michigan. We set forth here the material parts of this letter:[44]

> "By the provisions of a 'Joint resolution' of the Hon. Legislature, approved Feb. 2, 1841 the Govt. is 'Authorized to appoint the State Geologist or some other fit and proper person as commissioner to survey & mark the boundary line between this state & the Territory of Wisconsin, to act in concert with such commissioner as may be appointed by the U. States.'
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> In compliance with the resolution above referred to & by virtue of a commission from his Excy. the Acting Govr. I immediately opened a correspondence with

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[43] Wisconsin Exhibit 26, pp. 1, 5.
[44] Wisconsin Exhibit 360, pp. 1–2.

the Sect. of War, upon the subject, & recd. answer through the Col. of Topl. Engineers that no provision had been made by Congress of U. S. for the appointment of a commissioner to act *definatively* upon the subject of the boundary line, between Michn & Wiscon's; but that an appropriation had been made for the purpose of obtaining information as to the true courses of the streams, & for the purpose of determining whether the line can be designated as defined, & if not to furnish the data by which commissioners could safely & satisfactorily define the same. This answer was coupled with an expressed desire that I should act conjointly with the U. S. Party. I accordingly proceeded with the officer detailed upon the part of the U. S. to make an exploration of the entire boundary & country adjacent thereto, & do not hesitate to say that as it now is the boundary line cannot be satisfactorily 'run & marked'

This question which will eventually prove of great consequence to the interests and quiet of Michigan should be finally arranged with the least possible delay & a boundary so defined that it cannot be mistaken"

The above evidence shows that Houghton, acting as Michigan's official commissioner to adjust the boundary, made a careful survey for that purpose, and visited the Green Bay region in the course thereof. In short, he was fully informed in the premises, and his official position renders his information that of the State of Michigan. We submit that this fact alone is enough to dispose of Michigan's contention that she has been misled and has reposed in justifiable ignorance.

PORTER'S BILL.

Returning now to Congress, we find that on December 14, 1842, Senator Porter of Michigan obtained leave to introduce a bill to amend the Michigan Enabling Act. The bill appears

in the record as Michigan Exhibit 28, and we quote herewith the material parts thereof:

> "Whereas, since the passage of the act to which this is amendatory, that part of the boundary line as described in the second section thereof, which was designed to connect the head waters of the Montreal and Menominee Rivers, is found, from an actual survey of the country, to be impracticable, in consequence of an erroneous assumption in said act that the said Montreal river had its source in the Lake of the Desert: and Whereas, doubts exist and difficulties may arise as to the jurisdictional rights of the State of Michigan and the Territory of Wisconsin over the islands in said Menominee River and in Green Bay; now, for the purpose of defining with certainty the said boundary, and of *giving effect to the same according to the true intent and meaning of the act aforesaid,*
>
> BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,
>
> That the boundary line between the State of Michigan and Territory of Wisconsin, shall, in case the same shall be ratified by the said state as hereinafter mentioned, be established and confirmed as follows:
>
> * * * thence down the channel of the Menominee to Green Bay; *thence to the main ship channel of Green Bay, which passes on the western side of the islands situate therein;* thence along said main ship channel of Green Bay to the middle of Lake Michigan, as further described in said act."[45]

This bill was referred to the Committee on Judiciary and on January 17, 1843, that Committee, speaking through Senator Clayton, who had taken such a prominent part in formulating the legislation of 1836, made a report recommending

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[45] Michigan Exhibit 28, pp. 1-2. Italics are ours.

that the bill pass. The report quotes at length from Captain Cram's first report,[46] and then concludes as follows:[47]

> "The bill referred to the committee disposes of these difficulties by making the western channel the boundary, which throws the Islands in that bay to Wisconsin.
>
> The committee report the bill and recommend that it pass."

The bill passed the Senate but failed in the House.[48] It is of particular importance not as showing the congressional interpretation of the Michigan Enabling Act, but as notice to Michigan that the boundary might be thought uncertain. The most significant fact in connection with the bill is that it was introduced by the Senator from Michigan.[49] How can that State now assert that she has been misled?

The next significant fact, in chronological order, is the survey made by the United States government in the early '40s. As we have pointed out elsewhere, about $9,000 was spent to survey the channels of Green Bay,[50] and careful and detailed maps were made of the waters of the bay.[51] In the '60s, further surveys were made, and further charts drawn.[52] These surveys and charts were sufficient to furnish accurate scientific information to all concerned.

WINCHELL'S SURVEY.

In 1870, one Alexander Winchell was State Geologist of Michigan. He was a well known and competent scientist. Moreover, he was Douglass Houghton's official successor, and

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[46] Quoted on pp. 317–318 above.
[47] Michigan Exhibit 29, p. 5.
[48] Michigan Exhibit 30.
[49] Porter succeeded Lucius Lyon as Senator from Michigan. Wisconsin Exhibit 22, p. 2.
[50] Wisconsin Exhibit 65.
[51] Michigan Exhibits 97 and 99.
[52] Michigan Exhibits 100, 101 and 102.

as such must have been familiar with Houghton's reports, and hence with the existence and nature of the questions relative to the Wisconsin boundary. In the year mentioned, Dr. Winchell made a careful geological study of the Door County peninsula and the islands of the Grand Traverse. A photostatic copy of some of his manuscript notes of this survey appears in the record and gives Dr. Winchell's observations with reference to Death's Door, Washington Island, Detroit Island, Rock Island, etc. We find him expressly referring to Louse Island (Rock Island) as being in Wisconsin.[53]

## MICHIGAN'S CONSTITUTIONS AND CONSTITUTIONAL CONVENTIONS.

We shall now briefly consider the various constitutions and constitutional conventions of Michigan. As we have heretofore pointed out, the description of the Green Bay section of the boundary is identical in every one of her constitutions and proposed constitutions. In the convention which drew up the proposed constitution of 1867, there was an extended debate concerning the boundaries of the State, and changes were proposed for the purpose of making the Montreal River section of the boundary more definite. These proposed changes were discussed lengthily and not without heat, but not a word was said concerning the Green Bay region.[54]

Again, in 1873, a new constitution was proposed and changes were suggested to make the boundary in the Montreal River region more definite, but nothing was done or said concerning the Green Bay boundary.[55]

In 1907, the present constitution of Michigan was adopted, and the boundary article of the old constitution of 1850 was revamped to claim expressly the territory in the Montreal

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[53] Wisconsin Exhibit 368, pp. 7, 8.
[54] Wisconsin Exhibit 33.
[55] Wisconsin Exhibits 32 and 45.

River region which is involved in this lawsuit. No change was made in the description of the Green Bay boundary.[56] The omission to make any change in this connection is significant because of the fact that the Constitutional Convention had before it expressly the question of a boundary dispute with Wisconsin. In support of this statement we quote the following from the debates of the Constitutional Convention:[57]

> "MR. LOUISELL: I would like to ask the chairman of this committee if there is any good reason why this article on boundaries should be included in the Constitution?
>
> MR. BURTON: Our first idea was to leave the boundary lines out entirely, but, as you are aware, there is some question about the location of the boundary on the northwest, and very likely some action will be taken either in congress or in some of the courts in order to find where our western boundary is. The matter was submitted to the Attorney-General, and after some discussion with him he drew up this plan, including within our lines the piece of land which is in dispute, and it is properly inserted there for the purpose of having such influence as it might upon any settlement that we may enter into with the state of Wisconsin. It is not unusual in the Constitutions of the states of the United States to find the boundary lines defined.
>
> The question was taken on the amendment offered by Mr. Barnett, and the amendment was agreed to.
>
> THE CHAIRMAN: Are there any other amendments to this proposal? If not, it will be passed. (after a pause) It is passed"

The significance of the omission to suggest any changes in the Green Bay boundary cannot be brushed aside by the suggestion that the islands were inadvertently overlooked. They were not overlooked. On the contrary, the question of the

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[56] Wisconsin Exhibit 39, p. 2.
[57] Wisconsin Exhibit 40, pp. 2–3.

jurisdiction of the State of Michigan over the islands was expressly before the convention, as will appear from the following extract from the minutes:[58]

"The Secretary then read clause number twelve as follows: Any territory attached, or that may be attached to any county for judicial purposes, or not otherwise represented, shall be considered as forming a part of such county, so far as regards elections for the purpose of representation.

THE CHAIRMAN: Are there any amendments to this clause?

MR. FAIRLIE: I wish to ask for information as to whether this section has any application? I know of no conditions under which it can be applied; if that is the case it might as well be eliminated.

THE CHAIRMAN: Can any gentleman give me the information that Mr. Fairlie requests?

MR. HECKERT: The reason that was left in there was, as I understand it, because *there is something of a dispute as to the boundary line between the states of Wisconsin and Michigan,* and how it may terminate we do not know; and besides that the committee did not have any definite information as to whether all of the territory within the state is now incorporated. The section certainly will do no harm, and should any occasion arise requiring such a provision, it will be provided for.

MR. SAWYER: I am of the opinion that *this section would apply to the islands that are attached to certain counties* for judicial purposes, and for that reason I think it ought to remain—that there may be no question in regard to these outlying portions of the state.

THE CHAIRMAN: There is no question before the committee.

MR. BURTON: The possessions of the northwestern territory that are claimed by the state of Wisconsin include the question of the boundary line and involve the possession of certain of that territory. If the line of the state should be decided to be in accordance with the con-

[58] Wisconsin Exhibit 41.

tention made by the state of Michigan, such surplus land would be outside of the boundary line of any county now forming a portion of this state; and in that event some provisions should be made for taking such surplus land within some county if that contingency arises.

THE CHAIRMAN: Are there any amendments to this clause? There is nothing before the committee. If there are no amendments the clause will be passed. (After a pause.) It is passed"[59]

Thus the question of the island boundary was before the convention, and the action of that body with respect to the article on boundaries could not have resulted from inadvertence.

The last item of official notice to Michigan to which we desire to refer at present is the matter of the public surveys of government lands in that state. Official sketches of those surveys appear in the record as Wisconsin Exhibits 185 to 192, inclusive, the sketches being dated respectively 184__, 1851, 1852, 1855, 1857, 1866, 1878 and 1888. Not a single one of these sketches shows any surveys on the islands involved in this dispute. It must be assumed that Michigan officials were cognizant of these sketches and of the activities of the government in surveying public lands within their state; hence the sketches and surveys have been continuing notice to Michigan that the government of the United States recognizes Wisconsin's claim to the islands.

## GENERAL KNOWLEDGE OF THE ISLANDS

Not only did Michigan have official notice of the boundary situation, but we contend that knowledge of the islands was sufficiently diffused among the general public to make it impossible for Michigan to have been misled as she claims.

Practically all of the old maps in the record show islands

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[59] Italics ours.

at the entrance of Green Bay, and hence any one with even an elementary knowledge of the geography of the region must have known that there were islands there, and that there was a possibility of more than one ship channel. We refer to the following maps: Mitchell's Map of 1755,[60] Arrowsmith's Map of 1795,[61] Canadian Map of 1816,[62] Nolin's Map of 1756,[63] Bowen's Map of 1763,[64] Bellin's Map of 1755,[65] Canadian Map of 1720,[66] Kitchin's Map of 1763,[67] Huske's Map of 1755,[68] and a map of 1760.[69]

It is apparent from these maps that everybody who knew geography in those days had reason to know of these islands.

Another important fact is that the first settlement in Door County was on Rock Island, and was established about 1835.[70] Washington Island was settled about 1850.[71]

In 1855 the town of Washington was organized, comprising Rock, Washington, Detroit and Plum Islands.[72] Its population in that year was 310.[73] The present population of Washington Island is about 1,000.[74]

Thus it appears that from the time of the establishment of the boundary there had been settlements on these islands, and that they had come to be important and populous. It is incon-

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[60] Michigan Exhibit 1.
[61] Wisconsin Exhibit 111.
[62] Wisconsin Exhibit 112.
[63] Wisconsin Exhibit 113.
[64] Wisconsin Exhibit 114.
[65] Wisconsin Exhibit 115.
[66] Wisconsin Exhibit 116.
[67] Wisconsin Exhibit 117.
[68] Wisconsin Exhibit 118.
[69] Wisconsin Exhibit 119.
[70] Michigan Exhibit 128, pp. 33–36.
[71] Michigan Exhibit 128, pp. 35–36.
[72] Wisconsin Exhibit 362, p. 10.
[73] Wisconsin Exhibit 335, R. p. 463.
[74] Michigan Exhibit 128, p. 35.

ceivable that the people of Michigan and her officials did not know of the islands and of the channels between them.

We now call the court's attention to a number of unofficial maps made subsequent to the establishment of the boundary, all of which indicate the general understanding that the islands belong in Wisconsin: Farmer's Map of 1836,[75] Young's Map of 1837,[76] Cram's Map of 1839,[77] Bradford's Map of 1838,[78] Colton's Map of 1840,[79] and Mitchell's Map of 1846.[80]

It may not be plain at first glance that all of the above cited maps definitely show the islands in Wisconsin. Our assertion that they do indicate that fact is based on the tinting of the islands to correspond with that of Wisconsin and in a different way from that of Michigan, and upon the designation of township lines on the islands, to indicate that they were surveyed as part of Wisconsin rather than of Michigan.

Bradford's Map of 1838[81] is of especial interest by reason of the fact that it definitely indicates by a dotted line the boundary between Michigan and Wisconsin, and locates it north of the islands in question.[82]

It appears from these maps and hundreds of others, that map-makers and geographers have long known of the islands, and since 1836 have constantly considered them as being in Wisconsin. This exhibition of geographical knowledge and

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[75] Michigan Exhibit 86.

[76] Wisconsin Exhibit 181, part of which appears in the supplement as Figure 26.

[77] Wisconsin Exhibit 183, part of which appears in the supplement as Figure 27.

[78] Wisconsin Exhibit 359, part of which appears in the supplement as Figure 28.

[79] Michigan Exhibit 59.

[80] Michigan Exhibit 43, a part of which is printed in the supplement as Figure 12.

[81] Wisconsin Exhibit 359. Part of this map is printed in the supplement as Figure 28.

[82] See testimony of Lawrence Martin, R. p. ——.

opinion seems to us alone sufficient to bar Michigan's claim that she has reposed in justifiable ignorance and has been misled.

## CHAMBERS ISLAND.

Our argument on these points is practically the same in regard to Chambers Island as it was for the northern islands. The evidence is of the same sort but less voluminous.

### Acts of Sovereignty and Jurisdiction by Wisconsin

Before Wisconsin became a state, the Territory of Wisconsin taxed lands on Chambers Island and sold certain parcels thereof for nonpayment of taxes. Wisconsin Exhibit 334 is a record of the lands on the disputed islands so sold, and the register of deeds of Door County testified that some of the descriptions given in the exhibit are located on Chambers Island.[83]

In connection with the other islands, we have called the Court's attention to the election returns which appear in the record. These show that in 1861 the voters of Chambers Island participated in the election of a circuit judge for the Tenth Judicial Circuit of Wisconsin.[84]

In the '60s, Chambers Island was an organized town, being a part of Door County, Wisconsin.[85] During the Civil War the Adjutant General of Wisconsin drafted one soldier from Chambers Island, which was listed as a sub-district of Door County, Wisconsin.[86]

Wisconsin Exhibit 333, which is the tabulation of transfers referred to heretofore, shows that there are on record in the office of the register of deeds for Door County a total of 1024

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[83] R. p. 463.
[84] Wisconsin Exhibit 43, p. 8.
[85] Michigan Exhibit 128, p. 41.
[86] Wisconsin Exhibit 42.

transfers of real estate on Chambers Island.[87] All of these transfers were made under the jurisdiction and laws of Wisconsin.

### Acts of Recognition by the United States

The United States government has consistently recognized Chambers Island as a part of Wisconsin, and the record discloses no instance in which the United States has ever considered it as being in Michigan.

We have referred to the fact that Captain Cram called the government's attention to the various channels in Green Bay, and that in the '40s about $9,000 was spent in surveying the channels in accordance with Cram's recommendation, and that additional surveys were made in the '60s.[88] Captain Cram's report pointed out that there was a Chambers Island, and that there were channels on each side of it.[89] The surveys to which we have referred all included the waters in the vicinity of Chambers Island.[90] There can be no contention that information relative to Chambers Island was not obtainable.

The first act of recognition by the United States government upon which we rely was the surveying of the islands as part of the public lands in Wisconsin. The Island has consistently been included in the government surveys in that state. It is first shown surveyed in Wisconsin in 1837,[91] and subsequent official sketches of the public surveys in 184— 1851, 1866 and 1877 show it included in the survey in that State.[92]

That the islands were never officially surveyed as part of

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[87] See R. pp. 460–462.
[88] See p. 310 of this brief.
[89] See map No. 4 attached to Michigan Exhibit 15.
[90] Michigan Exhibits 97, 99, 100 and 102.
[91] Wisconsin Exhibit 182.
[92] Michigan Exhibit 44; Wisconsin Exhibits 193., 194, 195, 196.

the public lands in Michigan is shown by the official sketches of the public surveys which appear in the record as Wisconsin Exhibits 185 to 192, inclusive, and are dated, respectively, 184—, 1851, 1852, 1855, 1857, 1866, 1878 and 1888.

The United States Geological Survey maps each show Chambers Island in Wisconsin,[93] as do the Lake Survey charts.[94]

### General Recognition

Every map which we have seen showing Chambers Island, either shows it in Wisconsin or is noncommittal. We have never seen a single map or document treating the islands as part of Michigan. There certainly are none such in the record. Among the unofficial maps which affirmatively show the islands in Wisconsin are Wisconsin Exhibits 183 and 359, and Michigan Exhibit 59.

### Acts of Recognition and Acquiescence by Michigan

Michigan's acts of acquiescence and recognition relative to Chambers Island are of the same nature as those commented on in regard to the other disputed islands.[95] The same conclusion is inevitable: That until the commencement of this lawsuit Michigan has acquiesced in Wisconsin's claims as fully as she possibly could.

### Michigan's Acquiescence Not Excusable on Ground of Mistake

In our consideration of the other disputed islands, we pointed out at some length the various ways in which Michigan was given official and unofficial notice of the facts concerning islands and channels. She had little if any more excuse for ignorance with regard to Chambers Island.

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[93] Wisconsin Exhibits 199 and 200.
[94] See, for instance, Michigan Exhibit 115.
[95] See pp. 312-313 of this brief.

The geographical knowledge of Schoolcraft, Lyon and Houghton was such that they must have known that there was a Chambers Island, and that vessels could pass on either side of it.[96] We find no express mention of Chambers Island in the writings and correspondence of Schoolcraft and Lyon which are in the record, but we do find that Douglass Houghton visited Chambers Island in his capacity as State Geologist of Michigan, on August 24, 1839, and that he camped on the island over night, taking careful note of the geological characteristics of the island and of its location, and also noting the Strawberry Islands.[97]

The meeting of the Territorial Legislative Council of Michigan at Green Bay in 1836, and the undoubted fact that the legislators came by the water route, must be taken as notice of the existence of the island and the channels.[98]

Captain Cram's first report and the map attached thereto are as significant in respect to Chambers Island as when considered in connection with the other disputed islands.[99] The map attached to Captain Cram's second report, however, does not show Chambers Island at all, and hence can have no importance in regard thereto.

The Senate bill introduced by Senator Porter of Michigan in 1842, which proposed to clarify the boundary by expressly referring to the channel west of the islands, loses none of its significance when considered in connection with Chambers Island.[1]

The surveys made by the United States government in the '40s and '60s included Chambers Island and the waters thereabouts as well as the northern islands and channels.[2]

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[96] See pp. 314–316, 320–322 of this brief.
[97] Michigan Exhibit 93.
[98] See brief pp. 316–317.
[99] Brief, pp. 317–319.
[1] Brief, pp. 322–324.
[2] Michigan Exhibits 97, 99, 100, 102.

The extract from Dr. Winchell's notes of 1870 which appears in the record shows that Winchell conducted geological explorations at Eagle Harbor and on Eagle Bluff.[3] This locality is directly across the Strawberry Channel from Chambers Island, and hence Dr. Winchell must have had the island called to his attention. See the previous argument in this connection.[4]

In connection with Washington Island and the three small islands near it, we called attention to the fact that there are in the record several official sketches of the public surveys of lands in Michigan,[5] and we pointed out that in none of those sketches does it appear that the disputed islands were ever surveyed by the government as in Michigan. The same observation is true with respect to Chambers Island, and the same significance must be attached to the fact.

## GENERAL KNOWLEDGE OF THE ISLAND

That geographers and map-makers were fully aware of the existence of Chambers Island and of its approximate location is clear from the fact that the island appears in the following maps made prior to 1836: Franquelin's map of 1688,[6] Arrowsmith's map of 1795,[7] Canadian map of 1816,[8] Canadian map of 1720,[9] Farmer's map of 1829,[10] School-

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[3] Wisconsin Exhibit 368, p. 1.
[4] Pp. 324–325 of this brief.
[5] Wisconsin Exhibits 185–192, inclusive.
[6] Wisconsin Exhibit 101.
[7] Wisconsin Exhibit 111.
[8] Wisconsin Exhibit 112.
[9] Wisconsin Exhibit 116.
[10] Wisconsin Exhibit 131. A part of this map appears in the supplement as Figure 6.

craft's map of 1820,[11] Farmer's map of 1830,[12] and Carver's map of 1766.[13]

Thus all persons familiar with the geography of those regions must have known of the islands in 1836.

A number of unofficial maps subsequent to 1836 show Chambers Island in Wisconsin. See, for instance, Bradford's map of 1838,[14] Young's map of 1837,[15] Cram's map of 1839,[16] and Mitchell's Map of 1846.[17]

It must not be thought that Chambers Island was always the uninhabited piece of woodland which it now is. It was formerly a very considerable community. In proof of this we quote the following extract from Holand's History of Door County, Wisconsin.[18]

> "To most people Chambers Island is but vaguely known as a desert island lying far out amid the heaving seas of Green Bay, the largest private estate in Door County, where the deer roam unmolested through the timbered arches. Fifty years ago, however, Chambers Island was not only a settled community, but was an organized town, where the voters once a year gathered in solemn conclave to discuss the needs of roads and bridges, distribute political honors, and grumble at the state tax. It had a full array of town officers with no less than three justices of the peace, three constables, and even a 'Sealer of Weights and Measures,' for a good measure. It had a public school and a postoffice, farms, orchards, livestock; a sawmill and a ship building plant * * *"

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[11] Wisconsin Exhibit 161.

[12] Michigan Exhibit 5; Wisconsin Exhibit 162. A part of the latter exhibit is printed in the supplement, Figure 20.

[13] Michigan Exhibit 96.

[14] Wisconsin Exhibit 359.

[15] Wisconsin Exhibit 181.

[16] Wisconsin Exhibit 183.

[17] Michigan Exhibit 43.

[18] Michigan Exhibit 128, p. 41.

There can be no excuse for the officials of Michigan remaining in ignorance of this island, in view of the populous community which it once was.

**MICHIGAN IS ESTOPPED TO DENY THAT SHE HAS ACCEPTED THE BOUNDARY FIXED BY THE WISCONSIN ENABLING ACT AND INCORPORATED IN THE MICHIGAN CONSTITUTION OF 1850.**

As has been previously shown, after the adoption of the Michigan constitution which incorporated the boundary description found in the Wisconsin constitution, the United States government caused surveys to be made on both sides of this line and assigned to the respective states the lands on their respective sides of the line so surveyed and described in the Wisconsin Enabling Act. Settlement commenced, communities developed, property was acquired by individuals in reliance upon these lines. Highways were built, schools were developed, county government organized and in the instance of Iron County, a court house and jail were built within the disputed area. Bonds were issued and sold in reliance upon Michigan's assertion that the boundary of Wisconsin was her boundary. The bondholders who purchased these bonds are not parties to this suit, nor are the numerous land owners whose titles would be clouded by an adverse decision. Innumerable individuals will be affected by a decision sustaining Michigan's claims. Their rights cannot be protected by any decree that this Court might enter. If it is assumed that Michigan is actually right in her claim made in this proceeding, it must be held that in fairness to the persons above referred to and the indefinite and uncertain classes who can under no circumstances be made parties or be protected in this proceeding and who will be injured by a decision finding in favor of Michigan because they have relied upon Michigan's assertion that she has adopted the Wisconsin boundary, that

Michigan is now estopped to deny that she accepted the Wisconsin boundary, and is estopped to claim any other boundary.

To illustrate the situation the bondholders would find themselves in, we present the Wisconsin constitutional and statutory provisions under which these bonds were issued. Article XI, Section 3, of the constitution provides that:

> "Any county, city, town, village, school district or other municipal corporation incurring any indebtedness as aforesaid, shall before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same; * * "

Section 67.05, paragraph 10, Wisconsin statutes, provides that:

> "DIRECT, ANNUAL, IRREPEALABLE TAX. The governing body of every municipality proceeding under this chapter shall, at the time of or after the adoption of an initial resolution in compliance with subsection (1) or subsection (2), or, after the approval of such resolution by popular vote when such approval is required, and before issuing any of the contemplated bonds, levy by recorded resolution a direct, annual tax sufficient in amount to pay and for the express purpose of paying the interest on such bonds as it falls due, and also to pay and discharge the principal thereof at maturity. The municipality shall be and continue without power to repeal such levy or obstruct the collection of said tax until all such payments have been made or provided for. After the issue of said bonds such tax shall be from year to year carried into the tax roll of the municipality and collected as other taxes are collected. No further or annual levy for that purpose shall be necessary."

The real security back of the bonds is the right to compel the levy and collection of these taxes in cases of default. If Michigan prevails, however, the entire issues must fall because the legal foundation upon which they rest will be wiped

out. The effect of a decision in favor of Michigan would be to leave the bonds without any law to authorize or sustain them.

So far as the school district bonds are concerned, the claim may be made that they will still have the territory west of the West Branch of the Montreal River to fall back upon. That argument, however, disregards the fact that the bondholders, when they purchased these bonds, relied upon the territory to the east as well as to the west of the West Branch of the Montreal River, and they have a right to demand that their security be not impaired. Such an argument also disregards the undisputed evidence in the record that bond issues outstanding, if secured only by the taxable property of the area west of the West Branch of the Montreal River, will exceed five per cent of the value of that property, and therefore the bonds will be illegal and void under the Wisconsin constitution and statutes.

Article XI, Section 3 of the constitution provides that:

> "No county, city, town, village, school district or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to any amount, including existing indebtedness, in the aggregate exceeding five per cent on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness."

And Section 67.03, paragraph 1, Wisconsin statutes (1925) says:

> "* * but every municipality is forbidden to become indebted in any manner or for any purpose to any amount, including existing indebtedness, which in the aggregate exceeds five per centum of the value of the taxable property therein."

Moreover, the tax securing these bonds was spread over the property of the entire school district under the statute above

cited in direct proportion to the value of the property in the respective communities. If Michigan prevails, a large part of the assessment will be unprovided for and the bondholders' security will thus be entirely lost, for under the issue the remaining communities will only be obligated to raise their part of the annual assessment which would have been required had the status of the school district continued, without losing any of its territory.

The rule has often been announced that estoppel can effectually be pleaded against a state or the government where the facts establish a case of estoppel as between individuals.

*Clark v. United States*, 95 U. S. 539, 544.

> "The other objection relied on by the Government in this case is, that the claimant had no valid title to the steamer as against the United States, having obtained her from the Confederate Government, in 1863, in payment for supplies furnished to the Quartermaster's Department of that government. This objection cannot be sustained. When the contract was made with the claimant, the vessel was in Mexican waters, and not subject to the jurisdiction of the United States. The claimant was applied to for its use. It was agreed that he should be compensated. No question was made about his title, and it is not suggested that he was guilty of any concealment or suppression of the truth in regard to it. Under these circumstances, it would be bad faith on the part of the Government after getting possession of the steamer and getting it within its jurisdiction, under pretense of hiring it of the claimant, to set up that he had no title to it. This is so obviously in accordance with the justice of the case, that we deem it unnecessary to make any further observations on the subject."

*State v. Milk*, 11 Fed. 389, 397.

> "Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason, in morals or law, that will exempt them from the doctrine of estoppel. *Com. v. Andre*, 3 Pick. 224; *Com. v. Pejepscut Proprietors*, 10 Mass. 155; *People v.*

*Soc. for Prop. of Gosp.* 2 Paine, 545; *State v. Bailey*, 19 Ind. 452; *People v. Maynard*, 15 Mich. 463; *Cahn v. Barnes*, 5 Fed. Rep. 326."

*United States v. Willamet Val. & C. M. Wagon Road Co.*, 42 Fed. 351, 359.

*United States v. Willamet Val. & C. M. Wagon Road Co.*, 44 Fed. 240, 241.

While the case last cited was reversed in *United States v. Dalles Military Road Company*, 140 U. S. 599, the principle was sustained, otherwise the Court would have ruled out the pleas as being without merit. The effect of the Supreme Court decision is that the pleas are good if the defendants can establish the facts upon which the pleas were based, that is, that they had relied upon the action of the government which had treated the titles in issue as being good.

While we freely concede that the principle announced above has involved the government on one side and individuals on the other side, and the transactions related to business transactions between parties, and that so far as we are able to determine, no decision as between states can be found announcing a similar principle, we assert that the equities calling for the application of the doctrine to a situation like this are even greater when it becomes evident in a suit between sister states that their citizens and the public generally, in great and indefinite numbers and classes, cannot all become parties, cannot all protect their rights and equities in the situation, and cannot all be effectually protected except by the application of the doctrine here contended for. The same equities, the same considerations of fair dealing, the same injustice and hardship that would follow failure to apply the doctrine in the cases above referred to are present in this case, and in addition are multiplied a hundred fold by reason of the number of persons affected, and the size and extent of the area involved. No reason that we are aware of can be advanced why the doctrine

should not be applied in every instance where the failure to apply it would result in material damage and loss, whether to parties or to persons who are not parties.

## REPLY TO ARGUMENTS AND ASSERTIONS IN MICHIGAN'S BRIEF.

There are such a great number of positive misstatements in the brief of counsel in this case, and in addition thereto such a great number of improper inferences drawn from the evidence in the record that we have divided this phase of our brief into three sections: the first section pointing out the positive misstatements of facts; the second, the improper inferences drawn from the record; and the third, answering arguments which are based in part upon record proof, but which proof is entirely overcome by overwhelming proof contrary to the assertions made by the plaintiff.

Before proceeding upon a discussion of the various points raised by counsel, under the classifications above referred to, we wish to comment upon the method in which counsel have prepared their brief. Throughout the brief, assertions are made as to what is in the record or what witnesses testifiy to or what exhibit or proof in the record illustrates their point, without referring to the part of the record sustaining their assertions or upon which they base their conclusions. For that reason it is somewhat difficult to point out in each instance the specific reason why counsel are wrong in their claims and conclusions. We have, however, searched the record carefully in making our answers to their various claims, and believe we have called the Court's attention to everything that can bear out the proposition we set forth in reply to the assertions made. If we have overlooked anything which sustains counsels' theory, it has

been due to the fact that we have not been furnished by counsel with the authority upon which they base their statements.

## MONTREAL AND MENOMINEE SECTIONS.

### Positive misstatements of fact.

On page —— of counsels' brief appears an assertion that:

> "Following Cram's report the condition was reported to Governor Woodbridge of Michigan by Douglass Houghton, (Plaintiff's Exh. 16), state geologist of Michigan, and resolutions passed requesting Congress to further divide the line and authorizing the Governor to act in conjunction with a commissioner, to be appointed by Congress."

This is a positive misstatement of the facts in the record in that Governor Woodbridge was advised as to the condition of the boundary *prior* to the report of Captain Cram, (see pages 55–57, 59–62, Wisconsin brief) and as appears from the resolution passed by Michigan, Governor Woodbridge had information as to the imperfections in the boundary by about the time that Cram first got into the Menominee River country. (Wisconsin brief, pages 59 to 62).

On page 44 of the plaintiff's brief appears the assertion that:

> "Captain Cram further recommended that the islands of the Menominee and Brule be divided, all above Quinnesec Falls to go to Michigan and all below to Wisconsin."

This again is a misstatement of the facts. The recommendation of Captain Cram was that the division point be Pemene Falls and not Quinnesec Falls. (Plaintiff's Exhibit 170).

On page 19, the statement is made that:

> "The secretary (of the Michigan boundary commission of 1919) then reported his conclusions to the Governor and Attorney General, and this action was commenced. Those conclusions were formed from the evidence now in the record in this case.
>
> The line was divided into three sectors, and this statement of facts represents the conclusions in said report which have not been changed by the evidence."

On page —— of plaintiff's brief, the statement is made that:

> "The Michigan commission learned that Congress had acted upon Exhibits 6 and 7 and intended the lake at the head of the Montreal by the language 'Lake of the Desert', that Cram had acted on Indian information, that there was no lake at the head of the Montreal and upon the Judson map which he found to be erroneous and supposed had misled Congress. No one person ever knew both of these facts until 1921."

These are misstatements of the facts in the record, there being no evidence introduced as to what the conclusions of the boundary commission were. The fact is that the defendant in this case served notice on the plaintiff to produce the report of the boundary line commission, but for some unknown reason that report was never produced, and never introduced in the record.

At page 23 of the plaintiff's brief, the statement is made that:

> "The first application of the name Montreal River to the East Branch is upon Cram's map."

This again is a misstatement of the facts, as is demonstrated by the record and particularly by Wisconsin Exhibit No. 131, the Farmer map of 1829, and Plaintiff's Exhibits Numbers 12, 43 and 86. (See also Wisconsin brief, pages 109–115.)

On page 27 of plaintiff's brief, the statement is made that:

> "Mr. Macy (Record p. 983) testified that eliminating the month of July 1925 (low stage) the ratio was
>
> West Branch ----------100%
> East Branch ----------100.7%
>
> That one additional week of peak discharge, such as is shown at the inception of each years data, *would* reverse the ratio."

The same statement again appears at page 66 of the brief. This is a misstatement of the evidence in that what Mr. Macey said was as follows:

> "Q. And might the addition of one week where the West Branch was exceeding the East Branch during any one of these six weeks, show the West Branch the bigger?
> A. It *very easily could.*"[1] (Italics ours)

On page 26 of the plaintiff's brief, counsel say:

> "Island No. ~~11~~ 2. Grand Island, an island in the Menominee below Quinnesec Falls, a large island which conditions indicate is formed from two or three islands.
>
> Surveyed as a part of Sec. 19, Town 38 No. Range 28 West, Michigan. Not surveyed in the original plats of Wisconsin (Sheet 22 Defendant's Exhibit 197).
>
> There is no evidence of survey by Wisconsin. (Sheet 24 Defendant's Ex. 198) However, taxation by Wisconsin is shown on Exhibit 336.
>
> Unoccupied and uncultivated."

This is a misstatement of the facts in that while the Michigan survey shows the outlines of the island, there are no meander lines shown on chart 22 of Defendant's Exhibit 197, which would appear if a survey had been made in Michigan, and in addition to this fact, Wisconsin Exhibit 154 shows that this island was surveyed as part of Wisconsin, and the survey

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[1] R. p. 983.

approved on the 21st day of March, 1836. It thus appears that the rather magnanimous concession made by counsel immediately following the quoted statement had more the element of the grandstand than of good faith in it.

On page 39, the statement is made that:

> "During the possession by the Ojibway, this district between the headwaters of the Menominee and Montreal and the many other streams finding their way into Lake Superior, Lake Michigan and the Mississippi; this high plateau country, studded with lakes on which were the settlements of the Sioux and Dakota, with their farms, came to be known in Indian as 'Gete Kitagaming,' the Deserted Farming Country. Most of the Voyageurs and couriers des bois were of French extraction and the name 'Gete Kitagaming' became 'Vieux Desert,' a French synonym, the deserted plantation country or the old farms. On the early maps this name appears variously in reference to either one large lake or a group of lakes, the relative position of the lakes varying considerably, but always being practically centered upon the divide between Lake Superior, Lake Michigan and the Mississippi."

The foregoing statement we consider a misstatement of the evidence in the record, as will appear from a reading of the record as is fully established by the various lines of evidence referred to on pages 148 to 157, Wisconsin brief. From this line of evidence it is very apparent that Lac Vieux Desert received its name from an Indian planting ground located on one of the islands, and that this fact located the lake as a specific geographical land mark for the period of a century or more prior to the establishment of the Wisconsin boundary line.

On page 6, the statement is also made that:

> "The judiciary committee of the Senate and the judiciary and territorial committees of the House, the latter committee being the one which received the map, Exhibit 6, March 11th, and Mr. Casey a member."

On page 44 of the brief, the statement is made that:

> "It will be further noted that Plaintiff's Exhibit 6 and 7, bears the note, 'drawn to accompany the report of the Hon. Z. Casey.' It elsewhere appears that the Hon. Z. Casey was a member of the Committee on Territories and used that map in connection with his report on other matters."

On page 45, the statement is again made:

> "The corrected map being drawn and furnished for a member of one of the committees which met in the joint session."

which apparently again refers to Hon. Casey.

All of the foregoing statements are misstatements of the evidence in the record, as testified to by Mr. Martin. Mr. Casey was a member of the Committee on Public Lands, and there is no evidence in the record that he was a member of the Committee on Territories. This is the only evidence in the record on that question. The fact that counsel did not see fit to cite authority for that statement, we think, confirms the charge, and a search of the Congressional Record will demonstrate that the statement is without any foundation either on the record or off the record.

On page 57 of the plaintiff's brief, the statement is made:

> "Following the admission of the state of Wisconsin, William D. Burt, was appointed to survey the line as described in the Wisconsin Enabling Act, which he did, inventing the Solar compass as an aid to the work because of the difficulties found with the magnetic compass on account of the ore deposits in the districts."

This again is a misstatement of the facts for the reason that the contract of William Burt for the survey of the boundary line was made on the 27th day of April, 1847,[2] and his report of survey was dated the 20th day of November, 1847, while Wisconsin was not admitted to the Union until 1848.

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[2] Wisconsin Exhibit 9.

Moreover, there is no evidence in the record just when the solar compass was invented by Mr. Burt, although counsel in their cross-examination of one of the Wisconsin witnesses attempted to show that the solar compass was used in this survey.[3]

On page 59 of the plaintiff's brief, the statement is made that:

> "The Attorney General (of Michigan) employed one Prof. Davis, of the University of Michigan, to *make a private investigation.*"

This again is a very obvious misstatement of the facts and is entirely inexcusable in view of the fact that the record shows[4] just how that investigation came to be made, and the plaintiff's complaint in this case alleges that such an investigation was undertaken pursuant to a resolution adopted by the legislature of 1907. The complaint[5] says:

> "Mr. White duly reported to the Michigan Legislature the result of his mission and, May 29, 1907, that Legislature passed a concurrent resolution (House Resolution No. 71) directing the Attorney General to cause a survey to be made, and to institute the necessary proceedings in the courts, or otherwise, 'to secure a determination of the correct boundary line between the State of Michigan and the State of Wisconsin.'
>
> Investigation was started by the then Attorney General and an engineer was employed to make some investigations * * * "

In view of this statement of the complaint and the evidence in the record,[6] counsel's assertion is so unfair and so untrue that it is entirely inexcusable.

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[3] Cross-examination of witness, Hotchkiss, R. p. 684.
[4] Wisconsin Exhibit 380.
[5] Plaintiff's Complaint, p. 32.
[6] Wisconsin Exhibit 380.

The statement is also made on page —— of the plaintiff's brief that:

> "At the same time (1907), a newly adopted court claimed the west branch as the boundary."

There is no evidence in the record of any such claim ever having been made, what the court was or where it sat.

On page 62, the statement is made that:

> "The Wisconsin engineers took the map, Plaintiff's Exhibit 173 and *corrected?* it. Defendant's Exhibit 350.
>
> The method was to have an engineer, Mr. Steinmetz, in the office of the Wisconsin Railroad Commission check the map with original government survey plats and squeeze the respective drainage areas out of shape by reason of small streams etc., not shown on the Michigan Engineers' map, which he claimed to find on the original plats. The result was so laboriously arrived at as to be difficult to dispute and showed a total watershed for the west branch of 87 sq. miles, and east branch of 114 sq. miles.
>
> Unfortunately, for this young man's efforts; at about the same time Stephen B. Soule, Chief of the U. S. Geological Survey for this district, had made a practical check on the drainage areas. His conclusions were far at variance with Mr. Steinmetz, and his correction of the figures in the report of the Wisconsin Railroad Commission with which both Mr. Steinmetz and Mr. Halbert were associated forced the admission by Mr. Halbert, pages 865 and 866, that the Michigan Engineers were substantially correct."

This again, we submit, is a deliberately unfair statement of the evidence in the record, a deliberate effort to mislead the Court as to the true evidence in this case, and because of its extreme unfairness, we will accord greater space and make a more detailed explanation than the importance of this testimony in the record would ordinarily warrant.

In the first place in the report of the Michigan engineers,[7] the Michigan engineers made this statement:

> "Your engineers had a map prepared from the *Government survey notes*, a copy of which is attached showing the drainage areas of the two branches."

We call the Court's particular attention to the statement that this drainage map, which became Plaintiff's Exhibit 173, was prepared, according to the statement of these engineers, from the government survey map. In the direct testimony of the engineers,[8] the following questions were asked and the following answers given:

> "Q Now, will you look at this blue print offered as Plaintiff's Exhibit 173 and tell me what that is?
>
> A That is a map they had prepared from the government township maps *and is merely a compilation of the government survey work.*"
>
> * * *
>
> Q What can you say as to whether it is a correct representation of that country in accordance with the government surveys as shown by the government plats?
>
> A It is correct as far as—*we merely copied the government survey notes.*
>
> Q And that is a correct copy?
>
> A It is a correct copy."

The witness Burridge on direct examination:[9]

> "I now show you a map, or blue-print endorsed 'Michigan and Wisconsin, showing drainage basins of the west branch of the Montreal River and Montreal River,' but with the writing before the last name 'east branch of.' 'Also the portion of Wisconsin affected by boundary change, scale one inch to one mile.' Is that the map referred to in your report?

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[7] Plaintiff's Exhibit 170, p. 5.

[8] R. p. 165.

[9] R. p. 148–149.

A Yes, sir.

Q Do you know who made this map?

A I examined the map and approved it. It was made under the direction of Mr. Rupp.

Q Can you say whether or not that is a substantially correct map as founded on the government charts?

A As near as I can determine.

Q The government charts showing the government survey in that region? A Yes, sir. I compared it with them.

MR. SAWYER: I offer that as plaintiff's exhibit 173.

MR. RIESER: You would say then, Mr. Burridge, this was a consolidated duplicate of the government survey in the region of the Montreal River, and from thence over to Lac Vieux Desert; is that right?

A Yes, sir.

* * *

The witness Rupp testified as follows:

Q Now will you look at this blue print offered as plaintiff's Exhibit 173 and tell me what that is?

A That is a map that I had prepared from the government township plats and is merely a compilation of the government survey work."[9a]

With that evidence in the record, the Wisconsin engineer Steinmetz, referred to in the above statement, took the government charts as he testified and prepared Wisconsin Exhibit 350. As a result of his checking the government survey charts, from which the eminent engineers employed by Michigan and in the defense of whom counsel have devoted so much of their brief, discovered that in place of being a compilation of the government survey charts, it was very far from it, as is demonstrated by an examination of Wisconsin Exhibit No. 350. (See also Wisconsin brief pages 129–130.)

The witness Steinmetz testified[10] that Wisconsin Exhibit

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[9a] R. p. 165.

[10] R. p. 511.

350 was first copied from Exhibit 173 prepared by the plaintiff's engineers, using as a basis for his corrections, the following:

> "A On the Wisconsin side of the main Montreal, the corrections were made on the basis of the original survey notes which are in this building in the capitol. On the Michigan side, the corrections were made from photostatic copies of the original survey maps of Michigan.
>
> Q Now you stated Mr. Witness that you got the information from survey notes. Did you mean survey notes or survey plats?
>
> A Survey plats, township plats.
>
> Q The same plats that are in evidence as exhibits in this case."
>
> A Yes."

On the basis of these plats which the Michigan engineers stated they had used, the corrections shown on Wisconsin Exhibit No. 350 were made, and assuming those government surveys to be correct, Mr. Steinmetz determined that the Montreal River drainage area above the confluence of the Montreal River with the West Branch was 114 square miles, and that of the West Branch above the same confluence was 87 square miles.[11] In other words, using the same data that the Michigan engineers claimed to have used, the witness Steinmetz demonstrated that not only had innumerable errors been made in the preparation of the map in question, but the drainage areas computed on that basis by the Michigan engineers was entirely erroneous. The evidence of Mr. Steinmetz was not offered to show the correct drainage area of these two streams. It was to demonstrate to the Court that the work of the Michigan engineers was so entirely unreliable that it could not be accepted for any purpose whatsoever. We think the map demonstrates that this was successfully done, and the efforts of counsel to discredit this work confirm that conclusion to our minds.

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[11] R. p. 512.

Counsel refer in their statement to the evidence of Mr. Soule. Mr. Soule was a Wisconsin witness, an employee of the United States Geological Survey. He was offered to show the correct drainage area because he had been studying it, and was best able to testify with reference to it. Nor was the testimony as to the actual drainage area as finally determined by Mr. Halbert, in co-operation with Mr. Soule, forced from Mr. Halbert, as counsel stated. On record page 804, on his direct examination, Mr. Halbert was asked:

> "Q Now, have you also made a study of the drainage areas of the two streams—the West Branch and the main Montreal River, to determine what the actual drainage areas are?
>
> A We have made as careful an investigation as we can with such maps as we have available, which we consider accurate, or at least most reliable, and from these sources, we find that the area above the confluence of the West Branch is 96 square miles, and that the area above the main Montreal at the confluence also, is 109 square miles."

Now, while this drainage area substantially agrees with that determined by plaintiff's engineers, the point we wish to make is that in using the government survey plats the area determined by the Michigan engineers could not have been procured, and that their report for that reason is entirely erroneous.

Some claim was made after the introduction of all this evidence that the Michigan engineers, in spite of the fact that they had stated in their report[12] that their drainage area map was made from original government surveys, and after they had solemnly sworn that such was the fact, they had forgotten that some of the information was obtained from actual examination of the country and some other information obtained from other maps. This evidence, however, was never of-

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[12] Plaintiff's Exhibit 170.

fered and is not in the record and it cannot change our observations made with reference to the quotation taken from the brief above.

The above evidence relating to drainage areas should again demonstrate to the Court that the numerous statements by counsel in their brief as to what the record shows or what the facts are cannot be accepted, and that counsel apparently have failed to cite authority for their statements because they have no authority in the record.

On page 68 of their brief, counsel state:

> "To a man the Wisconsin witnesses insisted that no wash could have occurred, until Arne Johnson, their gauge reader at the confluence stations, was produced to authenticate the readings."

Again, counsel seem to have forgotten the testimony of Mr. Halbert, which was to the effect that on the point in question he considered some washing had taken place, but that he could not tell exactly how much, although it was his conclusion that the entire point shown on Plaintiff's Exhibit 171 could not have been washed away in the time between the making of Plaintiff's Exhibit 171 and Defendant's Exhibit 120. No evidence has been introduced in this record to establish that fact.[13]

On page 71 of plaintiff's brief, counsel make the statement that:

> "The West Branch follows the course of the river shown on the map used by Congress and was the most important from the then important standpoint, its use as a means of transportation."

There is no evidence in the record, except perhaps the statement of counsel, that the West Branch was ever used as a means of transportation, and clearly the statement of counsel that the West Branch follows the course of the

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[13] R. p. 820–823.

river shown on the map used by Congress, is entirely wrong because the so-called East Branch approaches more nearly the Lake of the Desert and comes closer to the Menominee River than does the West Branch. What Congress had in mind was as nearly as possible an all water boundary, and for that reason, in arriving at the intent of Congress, the river should be selected which most nearly approaches the headwaters of the Menominee River. For this reason the statement of counsel above quoted is entirely wrong. It, of course, also implies again the assumption made by counsel throughout their argument that certain Burr maps, referred to as Plaintiff's Exhibit 6, 7 and 9, were before Congress, a fact which was not proven by the evidence in the record and which is quite conclusively demonstrated to be wrong by that same evidence.

On page 32 of plaintiff's brief, counsel make the statement that:

> "Island *No. XXI* Sugar Island,
> Surveyed as Lot 6, Sec. 3-31-27 Mich.
> Not shown on Wisconsin plats,
> Occupied by Menominee River Sugar Company and Central West Coal Company.
> This island is now under the Plaintiff's jurisdiction but is within the Wisconsin conditional grant and its claims in the answer herein."

In the first place, when the report was made by the Michigan engineers, after their trip down the Menominee River,[14] the report made the following statement:

> "The large island below this point being the site of the Montreal River Sugar Company factory and the Central Wisconsin West Coal Company plant, is also on the Michigan side."

No claim was made that this island at that time was surveyed in Michigan, and there is no evidence in the

[14] Plaintiff's Exhibit 172, dated Sept. 19, 1921.

record except an assertion by counsel at one point that this island had been surveyed in Michigan. He did not testify when this was done, by what authority. He did not offer any evidence how long, if at all, it had been taxed, or what steps had been taken by Michigan to claim the island. The fact that he had not discovered in 1921 that this island was surveyed in Michigan when he signed the report with engineers Burridge and Rupp indicates quite clearly, to our mind, that if any survey was made, it was made for purposes of convenience and made since the inception of this controversy. At any rate, there is no evidence in the record upon which counsel can now claim that this island has been claimed by Michigan with the assent of Wisconsin, or that Michigan has done anything inconsistent with Wisconsin's right to the island in question.

**Improper Inferences Drawn from the Record**

On page 11 of plaintiff's brief, reference is made to: "* * Thomas Jefferson Cram of Racine, Wisconsin." sin," and on page 73, counsel again state that:

> "Captain Cram was a resident of Wisconsin territory, perhaps imbued with the idea that his territory was being robbed of the upper peninsula."

There is no evidence in the record that Captain Cram was a resident of Racine. While he prepared the boundary line report and a report relating to the surveys in Green Bay at Racine, there is no evidence that Racine was his residence or how long he had been stationed there.

On page 13, the statement is made that:

> "Houghton was engaged upon the Geological survey of Michigan. Cram returned and filed his second report, Plaintiff's Exhibit 23, with maps of the Menominee and Brule and of the Montreal. On the latter the West Branch of the Montreal is very inaccurately portrayed as dividing into Middle River and Hemlock

> Creek (Plaintiff's Exhibit 112). Douglas Houghton drew a sketch of the same. (Defendant's Exhibit 103). The manuscript and sketch indicate that Houghton relied upon Captain Cram for his information."

Houghton was not engaged in the geological survey, at least his survey was incidental. He had been appointed a special commissioner by the State of Michigan to accompany Cram and proceed to the Montreal River for that purpose. In his report of the year 1842, he stated:[15]

> "In connection with duties assigned me relative to the boundary line between our own state and Wisconsin, I have been enabled to complete a very perfect Geological section of nearly 180 miles in length, crossing from the mouth of Montreal river to Lake Superior, to the mouth of the Menominee river of Green Bay, a district highly interesting both in its geological and topographical features. This section crosses the upper peninsula somewhat further west than any of the sections I have heretofore made."

which shows, of course, that the primary job of the year 1841 was the boundary, and the geological information obtained while performing the principal undertaking was a secondary matter.

On page 14, counsel say:

> "Cram had discovered Pine Lake at the head of the East Branch and caused an offset line to be run from the main line to accurately determine the position of its center, and he set a stake at the point where the main line of survey reached the East Branch, and called it Astronomical Station No. 2, and said in his report it might be taken as the headwaters of the Montreal."

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[15] Wisconsin Exhibit 26, p. 1.

A little further down in the brief, p. 15 counsel make the further statement:

> "Douglas Houghton reported to Gov. Woodbridge the information he had obtained from Captain Cram, concluding the line was an impossible one." (Citing Plaintiff's Exhibit 47 as authority for the latter statement.)

This is an improper conclusion drawn from the evidence. In fact, it approaches the field of misstatement, for the astronomical observations upon which astronomical station No. 2 was located were made by Douglas Houghton himself[16] and are in his journal based on his investigations of the boundary line as boundary commissioner, but his report was made in December, 1840 (Plaintiff's Exhibit 47, referred to by counsel) and this was made practically two months before the legislature of Michigan directed the appointment of a commissioner and some considerable time before Houghton was appointed, and at least six months before Houghton undertook his duties as commissioner. Thus, again, counsel have entirely misconceived the effect of the evidence so far as the extent and basis of Douglas Houghton's information is concerned.

On page 16, a statement is made:

> "No action of the State of Michigan ever ratified any adjustment of boundary, either before or after June 1, 1848, although Wisconsin had accepted admission as a state under the conditions named prior to the expiration of the date for ratification."

This proposition has been completely answered by a separate subdivision of our brief found on pages 99 to 108.

On page 21 of plaintiff's brief, counsel show the peak discharge and minimum discharge of each of the streams in ques-

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[16] Wisconsin Exhibit 7. Plaintiff's Exhibit 47.

tion, and state that the testimony of the Michigan engineers was based upon the figures, except as they were slightly altered by measurements taken after their report. That fact is again an unfair inference from the evidence. The Michigan engineers based their conclusion largely upon a float measurement made by them in 1920, which is fully discussed on pages 123 to 145 of our brief, and which shows some remarkable errors made by them.

On page 22 of the plaintiff's brief, the following statement is made:

> "From these (Wisconsin Exhibits 120, 120 A, Plaintiff's Exhibit 171), it appears the East Branch turns back from the general course of drainage and joins the West Branch against the grain of the country."

Counsel did not attempt to explain this rather startling statement, probably for the very evident reason that there is nothing in the record to support that conclusion. True it is, the Montreal River makes a turn at the confluence, but there is no evidence that the turn is back from the general course of drainage. An examination of the map discloses that the Montreal River makes numerous turns and meanders through the country as it avoids obstacles in its course. To demonstrate, however, that this condition did not exist, we point to the original survey charts found in this brief opposite page 142. These charts were made in 1849 and 1862 respectively, and show that the West Branch joined the Montreal River below this turn in the valley referred to.[17]

On page 23, the statement is made:

> "That an average pumpage from mines and wells is as follows:
>
> Into West Branch ----------1.6 cu. ft. per sec.
> " East Branch ----------4.7 " " " "

[17] Wisconsin brief, page 142.

On page 69, the statement is made:

> "It becomes apparent that the total pumpage into the East Branch is greater than that into the West Branch by three or four cubic feet per second."

No authority is given for these statements. We presume they are based upon the testimony of plaintiff's witness Macey, a gentleman with some hydraulic experience in the State of New York, who was called out to testify as to the relative size of the two streams, but who dared not venture an opinion.[18]

This witness did give the figures above quoted. Had counsel, however, fairly stated the evidence, they would also have shown what transpired on Mr. Macey's cross-examination, from which it appears that, by a process of extraction sometimes necessary in cross-examination of unwilling witnesses, Mr. Macey finally admitted that the pumpage into the West Branch was about one and one-quarter cubic feet per second, and into the East Branch two and one-quarter cubic feet per second, or a difference of one cubic foot, which was substantially the conclusion of the Wisconsin witnesses.[18a] This admission, we might say, could be characterized as being forced from the witness Macey by making him deduct duplications from the figures quoted in counsel's brief.

On page 13 of plaintiff's brief, the statement is made:

> "The name Montreal means white water and was applied by the French at the lower reaches.
>
> On the maps used by Congress (Exhibit 6 or 7), it is applied to a River with Branches from both directions heading in a lake.
>
> This is very similar to the condition shown on the Farmer map of 1829 (Defendant's Exhibit 131) on which appears the legend 'rapid but is ascended in canoes.' This

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[18] R. p. 983.
[18a] R. p. 993.

map was shown to be in the possession of Lucius Lyon, (Plaintiff's Exhibit 49).

The first application of the name Montreal to the East Branch is upon Cram's map."

Several inaccuracies appear in that statement. In the first place only one very inconsiderable branch leads off to the east of the river shown in Exhibits 6 and 7 and identified in Exhibit 6 as the Montreal River. The rest come in from the south or west.

Moreover, Wisconsin Exhibit 131 does not show any branches coming in from the east, but shows the West Branch rising in several small lakes, and shows the Montreal River extending beyond the confluence of the West Branch and the Montreal River, demonstrating thus that the river that was ascended in canoes was not the West Branch, but the Montreal River, which has been commonly referred to in this case as the East Branch. While we claim that no one can tell that Exhibit 131 was the identical map in the possession of Lucius Lyon when the boundary line was laid out, for the reason that Farmer had also published his similar map in 1836,[19] which is practically identical with the map of 1829, and another map of 1830 also in evidence in this case is also practically identical in that it shows the West Branch of the Montreal River, and that the Montreal River referred to in those maps extended beyond the confluence of the West Branch and that Montreal River, still, counsel having made the claim, we are willing to concede that fact because we know that Lucius Lyon relied upon one of the Farmer maps in consenting to the boundary aforesaid, as appears from his letter of February 17, 1840 to the Hon. H. D. Turner, a member of the House of Representatives of the State of Michigan,[20] wherein he states:

"Montreal river, before mentioned, is the western boundary of the country above described. It divided

[19] Wisconsin Exhibit 133.

[20] Wisconsin Exhibit 22, page 4.

> Michigan from the territory of Wisconsin: and according to Farmer's map of Michigan and Wisconsin, has its source in 'Lac Vieux Desert.' This representation on the map, however, I believe to be erroneous, for I learn from persons well acquainted with the country that 'Lac Vieux Desert' empties itself into and forms the head of the Wisconsin river, and that the Montreal river, at the point of its nearest approach to that lake, is at least 70 or 80 miles distant from it."

An examination of the maps referred to, including Plaintiff's Exhibit 49, referred to by plaintiff's counsel in the quoted part of their brief, will show, of course, that the statement, "the first application of the name Montreal to the East Branch is upon Cram's map," is entirely false because all of the Farmer maps in evidence and several other maps show the West Branch as distinct from the Montreal River.

On page —— of their brief, counsel claim that Island Lake and Pine Lake are Lakes of the Desert, and they concede that "Lac Vieux Desert is one of the lakes of the group." They have, however, failed to establish by any evidence in the record that either Island Lake or Pine Lake belong to a group of lakes known as Lakes of the Desert.

It has been clearly demonstrated by the maps offered in evidence that such is not the fact,[21] and clearly Lucius Lyon did not so consider it when he wrote his letter to the Hon. H. D. Turner.[22] When we consider that the nearest headwaters of any branch of the Montreal River are practically seventy miles away from Lac Vieux Desert, and that innumerable lakes are located between that lake and the headwaters of the Montreal River, it becomes, of course, apparent that counsels' theory is entirely erroneous.

On page 26 of plaintiff's brief, the statement is made:

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[21] Wisconsin brief, pages 148–157.
[22] Wisconsin Exhibit No. 22.

"To place all these islands in Michigan would in most instances give Plaintiff practical control of this river, since there are islands which most of the year are practically a part of Wisconsin shore, but would not in any degree compensate for the loss to Michigan of the islands her side of the main channel below Quinnesec Falls."

There is no evidence in the record that any of the islands above Quinnesec are practically a part of the Wisconsin shore during most of the year.

On page —— of plaintiff's brief, the statement is made with reference to Miscauno Island:

"It will readily be seen that the channel between the main island and the Michigan shore was formed by the river cutting across the neck of land, probably due to some temporary obstruction in the bend.

When the island was used as a log landing, this condition was repeated by the obstruction of the logs piled on the ice of the main channel, and during freshets again tore thru the channel on the Michigan side, cutting the long island shown on Cram's map into the two islands shown on the survey plats.

Since the close of logging operations, the river again seeks its main channel and the cut between the Island and Michigan bank is slack and grown to weeds."

Again, we have not been favored with the authority for these statements. We have made a careful search of the record and while there is some evidence that there are weeds growing in the channel between the island and the Michigan bank, we have been unable to find any other evidence of any of the assertions made above.

On page 29 of plaintiff's brief, after making a statement which we think is unsupported by the evidence, that is, that the great expanse of country between Lac Vieux Desert and the headwaters of the Montreal River some seventy miles away was all known as the "Deserted Plantation country," counsel make this statement:

> "From this, we feel it is safe to conclude that the term 'Gete Kitagaming', Indian, 'Vieux Desert', French, and 'Lake of the Desert', American, was at that time applied to the plateau where the Sioux and Dakota had had their farms, a district lying at the headwaters of the various streams finding their way into the two great lakes and the Mississippi river, none of which district was in any way accurately mapped."

Counsel by that statement admit the weakness of their position previously taken in the brief, that is, that accurate information had been furnished to Congress, that there were numerous Lakes of the Desert and that these various lakes were the sources of the several rivers leading respectively to the Mississippi, Lake Michigan and Lake Superior. Counsel have expressed their theory when they say, "It is safe to conclude," by which we assume they mean the same kind of conclusions they have drawn in the rest of the brief. Certainly counsel do not feel sure enough of their position to claim that the conclusions they wish to draw have been clearly established by the evidence.

On page 41, counsel state that:

> "In this connection, (see testimony of Col. Martin, page 667) the language of this bill as passed originated in an amendment March 25th, 1836, which materially changed the description of the line now in dispute and indicated recent accurate information in regard to the geographic features along that line, and an intention to make the line accord with the boundary described in S 177—the Michigan Enabling Act, introduced in the Senate March 22nd. The amendment was on motion of Mr. Clayton—author of S 178 and Senator from Ohio who appeared frequently in records of passage of S 177."

We can find no language in the testimony of Mr. Martin indicating any such conclusion or supporting any such statement. We do find, however, that Col. Martin testified that

the original Clayton bill, introduced January 21, 1836, provided a boundary definition as follows:

> "Thence on the north, following the ship channel into Green Bay, to the mouth of the Menominee River; thence up the middle of the main channel of said river to its source; thence in a direct line through the center of Lac Vieux Desert, and down the middle of the main channel of the river Montreal to its mouth."

By the amendment of March 25, 1836, referred to by counsel, the amendment of February 1, 1836, was stricken out of the Clayton bill and in lieu thereof the following words were inserted:

> "Through the middle of Lake Michigan to a point in the middle of said lake, and opposite the main channel of Green Bay, and through said channel and Green Bay to the mouth of the Menominee River; thence through the middle of the main channel of said river, to that head of said river nearest to the Lake of the Desert; thence in a direct line, to the middle of said lake; thence through the middle of the main channel of the Montreal River, to its mouth."[23]

Thereafter, Col. Martin points out why the description in the original and the amended bill does not sustain counsels' conclusion that the Michigan boundary definition was the result of the Burr map of March 11, 1836. He says:

> "The first point in connection with these two bills that relate to the Burr map of March 11, 1836, is the description of the lake commonly spoken of as The Lake of the Desert,—the description of the lake on this map agrees with that in neither of the two bills. On the map we have the designation 'Les Lac Vieux Desert'. In Mr. Clayton's original bill of Jan. 21st, we have 'Lac Vieux Desert', and in his amended bill of March 25th, we have in actually the same relationship the words 'Lake of the

[23] R. pp. 665-666.

Desert'. It is very evident that, if Mr. Clayton had had this map, he was in no way influenced by it (in) drafting his bill, and it is obvious that he refers to 'Lac Vieux Desert' as being the lake referred to as 'Lake of the Desert' on March 25th, when Mr. Clayton's revised description was introduced; after that date there is no modification of the boundary in the Wisconsin Territory description; so I feel, as far as this bill is evidence, that the date when the Senate passed it, or the date when the House passed it, is not as important as the date March 25th, when it was introduced in this form.

On March 1st, 1836, the Judiciary Committee of the Senate, reported out S 92, the Wisconsin Territorial Act, in the form in which it appears as S 92 dated March 25, 1836."

It will thus be observed that counsels' conclusions are in no way supported by the evidence in the record under any theory in the case.

On page 45, counsel state:

"It also appears that a copy of this corrected map was furnished to the Hon. Lucius Lyon, Senator elect from Michigan, and that upon that copy somebody drew a blue pencil line indicating where the boundary was in accord with the Plaintiff's contentions in this case. That another copy of said corrected map was filed in the Library of Congress with a line indicating the boundary."

There is no evidence in the record, however, that Lucius Lyon had the map referred to at the time the boundary line was under consideration by Congress. All that counsel have is a copy of the map found among the papers of Lucius Lyon. Such papers dated back to the period between 1834 and 1836. The circumstances under which these papers were found and preserved demonstrates, of course, that no one can reasonably draw the conclusion that Lucius Lyon had the map in question at any time in 1836.[24] His letter to the Hon. H. D. Turner

[24] See stipulation admitting exhibits, R. p. ——.

of February 17, 1840,[25] demonstrates that in 1836 he did not have the map referred to.

On page 53, counsel state:

> "All three parties arrived at the spot later designated by Cram Astronomical Station No. 2, now Cram Monument, at practically the same time. It is apparent and the testimony of the engineers in that connection shows, that this could not have occurred except by pre-arrangement for a meeting at a point to be determined by latitude and longitude, in other words, the meeting at the point later designated by Cram as the headwaters proper of the Montreal river was arranged by these parties before going into the woods, and does not reflect the discovery of conditions described in the boundary act, but merely was a point fixed by latitude and longitude to be used in further description of the line by Congress."

In the first place there is no evidence in the record that the point of meeting was to be determined "by latitude and longitude." The Michigan engineers testified that the meeting must have been brought about by previous arrangement, why or how they did not attempt to explain. On cross-examination of the witness Hotchkiss, counsel attempted to support their theory of agreement upon a point determined by latitude and longitude, but failed to do so,[26] and the testimony demonstrates that the theory of counsel was entirely impracticable and impossible.

On page 54 of plaintiff's brief, counsel state:

> "As a result of the meeting of Capt. Cram and Douglas Houghton, the latter reported to the Governor of Michigan that the boundary was an impossible line."

Counsel have again failed to give their authority for this assertion. The fact remains, however, that Houghton had,

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[25] Wisconsin Exhibit 22, p. 3.
[26] R. pp. 619–622.

nearly a year before making the expedition with Cram, fully concluded that the boundary was impossible, as is evidenced by his letter of December 1840[27] and his letter of July 22, 1840.[28]

Moreover, it is further demonstrated by Wisconsin Exhibit No. 7 that Houghton did not base his conclusions on his meeting with Captain Cram but upon his own observations as he followed up the Montreal River to the point determined upon by him and Captain Cram as the headwaters of that stream.

On page —— of the brief, counsel state that:

> "It has as its head a large lake, Island Lake, and that by local tradition, it is as well entitled to the name Montreal as is the East Branch, if not better."

However, referring to the West Branch, counsel do not say what the local tradition is upon which they base this fact. If it is the various names of the Montreal attached to the streams in the vicinity of the West Branch, then, of course, their theory is not supported, for the reason that none of these names attached until about 1885 or thereafter, and that until settlement of the country began in that vicinity, the West Branch of the Montreal River was commonly known by its Indian name "Gogogashugun."[29]

On page 70 of their brief, counsel state:

> "In Exhibit 170 the Michigan Engineers report the taking of float measurements for a comparative test of the two branches, which they say were substantially supported by the report of the Wisconsin Railroad Commission, on measurements at Gile and Ironwood respectively, from which they conclude that the flow in the West Branch is the greater."

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[27] Plaintiff's Exhibit 47.
[28] Plaintiff's Exhibit 16.
[29] See testimony of witness Sullivan, R. p. 945, 946.

A similar assertion is made on page 64 of plaintiff's brief.

We have previously demonstrated in our brief that the float measurements were not supported by the measurements taken at Gile and Ironwood,[30] for the reason that the flow in the West Branch, according to the United States geological measurements on the date when the Michigan engineers took their float measurements, showed only one-third of the claimed volume of water flowing down that stream, and only one-half the claimed amount flowing in the Montreal River.

On page 67 of plaintiff's brief, the statement is made:

> "The diagrams, Defendant's Exhibit 120–120a were made by a corp of engineers by the pacing compass traverse method, in 1924, and the lines indicate two different stages of waters edge and do not indicate well defined banks as in the case of Exhibit 171."

Counsel have again neglected to set forth the authority in the record for this statement. Our recollection is that there is no such authority for claiming any difference in the exhibits in the respect referred to. We have made a careful search and have been unable to find it.

**Instances in which preponderance of evidence is contrary to the inference drawn by counsel.**

On page 28 of the plaintiff's brief, counsel say:

> "Island No. VIII Merryman's Island in Menominee, below Quinnesec Falls * * *
>
> Condition—Surveyed in both states, but Wisconsin survey cancelled."

We freely concede the truth of that statement, but as pointed out in our main brief, the cancellation was not made

[30] See Wisconsin brief, pages 128–145.

because it was determined this island was on Michigan's side of the main channel, but because the Surveyor General's Department concluded that it was not an island at all, and cancelled it because of that fact.[31]

On page 47 of plaintiff's brief, it is said that:

> "As a result of Cram's first report, however, it was recorded that the line defined was an impossible line and that Lake Vieux Desert was the lake referred to by Congress."

This statement, we assume, is based upon counsels' theory that Island Lake was one of the Lakes of the Desert, and that it should have been so considered by Captain Cram.

The overwhelming proof, however, shows that Island Lake was not one of the Lakes of the Desert, but was one of the group known as Pine Wood Lakes.[32] Moreover, it is conclusively established that before Captain Cram ever came near the boundary, Douglass Houghton, State Geologist of Michigan, and Lucius Lyon, Senator-elect of Michigan and active in procuring a settlement of the Ohio–Michigan boundary dispute, both concluded that the boundary line defined by Congress in the Michigan Statehood Act was an impossible line and that the Montreal River did not rise in Lac Vieux Desert. Besides that, the Farmer maps of 1829[33] and 1836[34] and several other maps show that the West Branch of the Montreal River was known prior to Captain Cram's time, and that it did not rise in any Lake of the Desert. For this reason, we submit that the conclusion of counsel above quoted is not sustained by the proof, but that on the contrary it is conclusively established that there never was any basis for counsels' theory.

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[31] Wisconsin Exhibit 198, sheet 28.
[32] See Wisconsin brief, pages 152–157.
[33] Wisconsin Exhibit 131.
[34] Wisconsin Exhibit 133.

On page —— of counsels' brief, the statement is made that:

> "The first date of entry or taxation of any of the disputed area by Wisconsin was soon after her admission, but taxation and control of some description began as late as 1909, (Defendant's Exhibit 366) and Wisconsin is not today exercising jurisdiction over some of the islands in the Menominee in dispute, nor over some descriptions on the islands in Green Bay."

Again, counsel have disregarded the allegations of their own complaint, which positively states that Wisconsin is exercising jurisdiction over the entire area in dispute.[35] On page 40 of the plaintiff's complaint, it is said that:

> "Wisconsin has for many years disregarded the true and rightful boundary as described in the Act of Congress of June 15th, 1836, providing statehood for Michigan, and does now disregard same, and has for a long time past possessed and does now possess, and has asserted and does now assert, civil, criminal and political jurisdiction over those portions of the territory within the Michigan boundaries above described as the Montreal River section, the Menominee River section, and Green Bay section of the disputed territory, aggregating approximately 255,000 acres, including extensive and valuable mineral rights, water powers, and other water rights and privileges, and has unlawfully taxed and still continues to unlawfully tax said property, and the taxes assessed thereon have been paid and continues to be paid to the State of Wisconsin, while of right the State of Michigan is entitled to levy and collect taxes thereon.
>
> That the State of Michigan has been prevented from levying and collecting taxes on said land, not only because of the possession and civil jurisdiction thereof exercised by the State of Wisconsin, but because the government surveys thereof, made by the officers and agents of the government of the United States, were, unlawfully and without warrant so made and recorded as to make it ap-

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[35] See plaintiff's complaint, page 37.

> pear they are a part of the State of Wisconsin and they are not so made as to indicate a proper description thereof for taxation or other purposes within the State of Michigan, notwithstanding the fact that the Government of the United States had, before the making of said surveys, granted said territory to the State of Michigan, and has never granted the same to the State of Wisconsin."

Moreover, there is no evidence in the record to sustain counsels' assertion, except inferences that may be drawn from the fact that some of the islands in the Menominee River have not actually been surveyed. Most of these islands are very insignificant, and, according to the record in this case, are without value, for under the instructions issued to Dr. Hall in 1854,[36] all valuable islands in the Menominee River were to be surveyed by him and were so surveyed It thus follows that under the concessions made by the complaint and the evidence in the record, the assertion by counsel that Wisconsin is not now exercising jurisdiction is entirely without merit and is contrary to the great weight of evidence in the record.

Counsel at page 23 of the brief states:

> "The report of Michigan Engineers discloses that the West Branch was used for log driving and would be navigable for canoes, the East Branch would not except in flood stages."

And on page 70, the statement is also made:

> "The testimony shows the West Branch with the remnants of improvements for log driving and that of the two it alone would present any possibility for canoe travel other than in flood stages."

Again, we have carefully examined the report of the Michigan engineers, the only authority relied upon by counsel. We are unable to find any support for the assertion. We do find this statement, however:

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[36] Wisconsin Exhibit 365.

"There are no evidences of changes in water level, except in a few places which we have noted in the field notes where dams were built by the early lumbermen to drive logs down *these branches* in the spring."[37] (Italics ours)

Moreover, the testimony of the Michigan engineers was to the effect that at any time, in entering into the West Branch from the main river, canoes would either have to be portaged or dragged through.[38]

It is further conclusively established that the channel to the west of the largest island in the confluence selected by the Michigan engineers is dry during periods of normal flow,[39] and that from 20 to 30 per cent more water would have to flow down the West Branch than was flowing on September 16, 1924, before any water would pass around that island. Thus if Michigan's theory of this boundary is to prevail, then in place of a water boundary leading from the Montreal River up the West Branch, there will for a short distance at least be a dry channel. We submit, therefore, that counsel have failed to establish their contention as to the greater navigability of the West Branch of the Montreal River. In further confirmation of this claim, we refer the Court to the report of Professor Davis,[40] in which he states that once at the confluence, it is easy to determine which is the main channel, and he concluded that the Montreal, or as the plaintiff calls it, the East Branch of the Montreal, is the main channel.

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[37] Plaintiff's Exhibit 170, p. 2.
[38] R. p. 248, 249.
[39] Wisconsin Exhibits 123 and 123a.
[40] Wisconsin Exhibit 380, p. 89.

## GREEN BAY SECTION.

We shall not attempt to answer all the arguments in Michigan's brief, as our own brief fully sets forth our theory of the case. In this place, however, we shall give attention to a few of the statements in the Michigan brief which seem worthy of especial notice. As in the case of the Montreal and Menominee sections, we treat these assertions of Michigan's counsel under three heads: (1) Positive misstatements of fact; (2) Improper inferences drawn from the record; and (3) Instances in which the preponderance of the evidence is contrary to the inference drawn by counsel.

### Positive Misstatements of Fact

On pp. ——, of their brief, counsel say that the Rock Island light "alone was totally insufficient to make the navigation of Rock Island passage even practical." This statement is wholly unsupported by evidence, and there is a large amount of evidence to the effect that navigation of the Rock Island passage has always been practical.[1]

On p. 35, counsel state that:

> "Captain Betts saw the light burning in 1845 and knew the name of the keeper and that it was discontinued in 1850 when Pilot Island light was built,"

and on pp. —— they make a similar assertion. These statements are entirely erroneous. What Mr. Betts, who was not a captain, did say, was that he first came into the waters of Green Bay in 1855,[2] and that the first Plum Island light was discontinued when the Pilot Island light was built in 1858.[3]

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[1] Wisconsin Brief, pp. 158–189.
[2] R. p. 27.
[3] R. p. 30.

**Improper Inferences Drawn From the Record.**

Under this head we shall refer to a few assertions in the Michigan brief which have no support whatever in the evidence.

On p. 34 it is stated that:

> "The charts (Plaintiff's Exhibits 114 and 115) and the testimony of Col. Martin, Record page 656–9, disclose that the Porte des Morte passage is the safer and wider."

This is a misstatement of the import of the evidence specified. Neither charts nor testimony show that Death's Door is either safer or wider than the Rock Island passage.[4]

On p. 35 we find the following:

> "The appropriation of 1848 for a light-house in Porte des Mortes passage was spent for Pilot Island."

So far as we have been able to find this statement is wholly unsupported by the evidence.[5]

On p. 36 it is said:

> "Many historical articles were offered indicating travel along the east shore and thru Porte des Morte."

If by this assertion counsel mean to refer to the year 1836 and prior years, their statement is wrong, as the record contains but three or four such accounts at the most, and most of these deal with travel by canoes or similar small vessels or with pleasure frolics such as that of Mrs. Baird.[6]

On p. 36, it is stated that

> "without exception the early maps indicate a better knowledge of these channels" (Death's Door and Strawberry Channel).

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[4] Wisconsin Brief, pp. 167–174.
[5] See Wisconsin Brief, pp. 183–184.
[6] See Wisconsin Brief, pp. 174–179, 265.

This is not true, and we hope the Court will look at the maps for proof thereof.

On p. 79 of Michigan's brief appears the following:

> "Later the same Captain Cram expended sums appropriated for the purpose of surveying the Boundary in a survey of Door County, Wisconsin, including the Islands now in dispute. He did not, however, attempt to locate the boundary."

This statement is wholly unsupported by the evidence. There is no proof that Captain Cram's surveys in the Green Bay region were not made with a bona fide purpose of determining the boundary, or that his inclusion of the islands as part of Wisconsin was not in deliberate recognition of the fact that they are on the Wisconsin side of the boundary.

On p. 79 appears the following:

> "These islands having been surveyed in connection with Wisconsin mainland came to be treated as part of Wisconsin in the natural course of proceedings, and were never called to the attention of Michigan officials until the appointment of the Boundary Commission."

On pages 313–331, 333–337 of this brief we show conclusively that Michigan has at all times been informed of her rights.

We next find the following statement, on page 79:

> "Cram's survey being as it was an expenditure of sums appropriated for the purpose of surveying the Boundary, and in line with his instructions in 1841 to map the surrounding country, is a clear indication of where the most usual ship channel was.
>
> In this connection it is also important to note that his survey included soundings and such other marine data as would aid navigation of this channel.
>
> This alone should be sufficient to determine the question since Cram's survey mapped merely the Porte des Mort and Strawberry passage, and was an aid to navigation thru those channels only."

We are at a loss to know where counsel get this information, for we find nothing to support the statements made. The only maps in the record which purport to represent surveys of the channels in the '40s are Michigan Exhibits 97 and 99, the former of which was prepared by Lieutenant J. H. Simpson under the direction of Captain W. G. Williams in 1842, and the latter of which was surveyed under the direction of Captain W. G. Williams, by Lieutenant J. W. Gunnison in 1845. Captain Cram's connection with these surveys does not appear, save as his report of 1842 shows that he must have been in general charge of the survey in that year.[7] Michigan Exhibit 97 does not include any soundings except a very few close to shore near Death's Door, and is obviously not by any means a complete map of any channel. Its sole significance lies in the fact that it shows all of the disputed islands surveyed in connection with part of the mainland of Wisconsin, thus by implication involving a determination that the boundary was to the west and north of them, as Wisconsin claims it was. Michigan Exhibit 99 is a more thorough chart, showing a large number of soundings, but not purporting to be a complete map, as witness the fact that Pilot Island, and part of Detroit and Washington Islands are not shown. The passages on either side of Chambers Island are mapped with equal thoroughness.

We now quote the following from p. 81 of Michigan's brief:

> "The steamers ran regularly from Buffalo to Mackinaw and Milwaukee and Chicago, and other southern Lake Michigan ports, occasionally entering Green Bay on the trip up from Chicago or Milwaukee.
>
> The goods were reshipped from Chicago, Milwaukee or Mackinac to Green Bay in schooners, except for small individual shipments in Mackinaw boats."

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[7] Michigan Exhibit 94.

These statements are absolutely incorrect and without a particle of support in the evidence, if they be considered to apply to 1836 and the years prior thereto. We have shown that Chicago and Milwaukee did not become ports of material size until 1836 or later.[8] There is not a bit of evidence in the record that goods were ever reshipped from Chicago or Milwaukee to Green Bay before 1836. Those which might have been reshipped from Mackinac to Green Bay would naturally have come through the Rock Island passage.[9] We find no evidence that ships entered Green Bay on the trip up from Chicago or Milwaukee in or prior to 1836.

The following appears on p. 81 of Plaintiff's brief:

> "For all this traffic the Port des Mort's passage presented a course as short and for the majority of it, much shorter than the Rock Island passage."

What traffic this statement refers to is not clear, but if it is meant to apply to any representative item of shipping in or prior to 1836 the statement is wrong, for we have shown that the majority of commerce at that time went from Green Bay to Mackinac.[10] It is obvious that for such traffic the Rock Island passage is shorter than the route through Death's Door.

From p. 82, we quote the following:

> "The mariner is guided thru this channel by this headland on the South and Plum Island on the North. On the Lake Michigan side Pilot Island is a natural guide to the entrance from which even on the darkest night a course could be set thru the passage.
>
> This island could be approached close enough to become visible on any but the darkest night without danger (Capt. Clow's wreck, History of Door County)."

So far as we can find, this statement is unsupported by evidence in the record. There is evidence, however, that Pilot

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[8] Wisconsin Brief, pp. 207–221.
[9] Wisconsin Brief, pp. 187–189.
[10] Wisconsin Brief, pp. 189–240

Island is but a low and inconspicuous rock,[11] and would seem to be more of a hazard than a natural guide. There is no evidence that before the light was established on the island, it was conspicuous on all but the darkest nights. It is interesting to observe that Plaintiff's counsel refer to an account of a wreck in their attempt to prove the safety of Death's Door. As a matter of fact, there have been a great many wrecks in the Door, and in the vicinity of Pilot Island in particular.[12]

On pp. 8V of Michigan's brief appears the following:

> "Nor is there any natural Pilot such as Pilot Island to furnish a bearing from which to set a course thru this passage, but rather a set of dangerous reefs to receive the approaching vessel.
>
> Fishermen's Shoal and Fish Island Shoal submerged three miles off shore are both a menace to any craft approaching Rock Island from Lake Michigan. They were practically unknown until 1863 and were unmarked until 1878. They surely would have been known had there been any considerable traffic by this route."

There is no proof of the first assertion, for there is nothing to show that the St. Martin's Island Shoals were dangerous in the least to vessels of the type which navigated the Great Lakes in the '30s and prior thereto. Colonel Lawrence Martin testified as follows concerning these shoals:[13]

> "A The name St. Martin's Island shoals apply to two different shoals as indicated on the map. The vessel of a light draft would clear the south part of the easternmost of those shoals where a depth of 16 feet is shown; it could clear the middle or south part of the westernmost of those shoals where a depth of 15 feet is shown."

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[11] Michigan Exhibit 128, pp. 28–30.

[12] Michigan Exhibit 128, pp. 30–32. See also Wisconsin Brief pp. 171–173.

[13] R. P. 742.

As we have heretofore shown, vessels drawing as much as nine feet were considered large ships even as late as the '50s.[14]

A glance at the large chart which appears as Michigan Exhibit 114 will show that Fish Island and Fisherman Shoal are not in any respect hazardous to vessels plying between Green Bay and Mackinac by way of the Rock Island passage. It is wholly immaterial that they might cause trouble to ships from southern Lake Michigan to Green Bay, for there was scarcely any traffic between those places in 1835 and prior thereto.[15]

We quote as follows from p. 83 of Michigan's brief:

> "The hazards of the Rock Island passage continue for a distance of 10½ miles as against the 1 mile thru the door."

We are unable to find any proof in the record for this assertion, or for the one which follows it, to the effect that a careful mariner approaching Rock Island before the days of modern lights and buoys would go through the Door or St. Martin's passage, in preference to Rock Island passage.

Counsel intimate at various places that there was an old light on Plum Island in the '30s. There is absolutely no proof in the record that such was the case. There is affirmative proof that as late as 1847 the only light in the vicinity was on Rock Island, and that the first light in Death's Door was built in 1848.[16]

On p. 86 appears the following:

> "The same reasons which attracted the heavy lumber shipping of the seventies and eighties to the Door instead of Rock Island, would apply to the shipping of the earlier days and a comparison of that shipping from the testimony of the many witnesses on the subject is about fifty to one in favor of the Door."

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[14] Wisconsin Brief, pp. 241, 266–267.
[15] Wisconsin Brief, pp. 189–240.
[16] Wisconsin Brief, pp. 182–183.

This statement is without support in the evidence. The proof is clear, on the contrary, that the shipping in and prior to 1836 was principally between Green Bay and Mackinac, and that it took the Rock Island passage.[17] Michigan insists on arguing this case on the basis of shipping routes as they were in the heyday of the Chicago lumber traffic in the '80s.

On p. 56 of Michigan's brief, we find the following:

> "The door was the shortest route, the least hazardous, the most easily made perfect and was in fact the one most used in 1836, just as it was later."

This statement is not true and has no support in the evidence.

**Instances in Which Preponderance of Evidence Is Contrary to the Inferences Drawn by Counsel.**

Counsel say: p. 34

> "These charts and sailing directions, (Plaintiff's Exhibit 119), and Pilot Books (Plaintiff's Exhibits 118 and 180) indicate both the Porte des Morte and Strawberry passages better natural channels requiring less artificial marking for purposes of navigation, and in fact fairly safe without any marking."

The evidence does not warrant this deduction. There is plenty of evidence in the record that neither Death's Door nor Strawberry Channel were even reasonably safe before they were marked.[18]

We next quote from p. —— of Michigan's brief:

> "Having been surveyed in connection with Wisconsin, when entered the descriptions were returned to Wisconsin for taxation a process becoming complete about 1910, except for Government reservations and Detroit and Plum Islands."

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[17] Wisconsin Brief, pp. 158–240.

[18] Wisconsin Brief, pp. 169–174, 255–257.

This statement may be technically correct but it is misleading, for Wisconsin's assertion of dominion over the islands and taxation of lands thereon became substantially complete sixty years or more ago.[19]

On pages 200 ff. of her brief, Michigan makes a good deal of the fact that the passage through Death's Door is shorter than the Rock Island passage for vessels plying between Green Bay and southern Lake Michigan ports. This is obvious enough, but immaterial, for we have shown quite conclusively on pp. —— of this brief that in and prior to 1836 there was a great deal more traffic between Green Bay and Mackinac than between Green Bay and southern Lake Michigan ports.

On p. —— of the brief, Michigan's counsel state that the types of boats in use in the '30s were "Mackinaw boats, schooners and occasional steamer." This is true enough, and we merely call attention to the fact that the Mackinaw boat was a very small contrivance, while Congress referred to the *ship* channel. The Mackinaw boat could not possibly be considered a ship.

On p. — of Plaintiff's brief appears the following:

> "A passage between bold headlands with deep water close to land is relatively safe."

This is an excellent argument for the Rock Island passage. We invite the Court's attention to the profile of the various channels which appears as Figure 29 of the Supplement, and which is explained on pp. 167–168 of this brief. This profile shows clearly where the boldest headland and the deepest water is.

On pp. 87 of their brief, counsel for the plaintiff say:

> "Rock Island passage has a minimum width—Testimony of Col. Martin, 2⅜ miles. This, however, is not the effective width since the passage is made at an angle so that upon the course given thru this passage a vessel is

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[19] Wisconsin Brief, pp. 308, 331, Wisconsin Exhibit 371.

> menaced at one point by an unmarked shoal within one-half miles to the north and later by Rock Island one-fourth miles to the south."

This is a very specious argument. We invite the Court's attention to any one of the numerous accurate maps and charts which are in evidence.[20] They will show that it is not necessary to go at an angle through Rock Island passage any more than through Death's Door, and further that a vessel coming from Mackinac into Green Bay would be likely to approach Death's Door at a much sharper angle, and with correspondingly less distance from obstacles than would be the case with respect to a vessel coming through Rock Island passage.

On p. 63 counsel say:

> "To the North of Rock Island and squarely in the opening between Rock and St. Martin's was the nine foot shoal unknown until 1863, and unmarked until 1878."

This statement is technically accurate, but has a tendency to mislead, by giving the idea that the nine foot shoal is a hazard to the passage between Rock Island and St. Martin's Island Shoal. As a matter of fact, the nine foot shoal is farther from the course of vessels through Rock Island passage than is St. Martin's Island Shoal, and hence is not an impediment to navigation in the main part of Rock Island passage, i. e., the channel between Rock Island and St. Martin's Island Shoal.[21] It is doubtful if the nine foot shoal was any impediment at all in the '30s, for as late as the '50s ships drawing nine feet of water were considered large.[22]

On pp. 63 of their brief, counsel have considerable to say concerning the subject of government improvements made long after 1836. We do not believe that this evidence is ma-

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[20] For instance, Michigan Exhibit 114.

[21] See any accurate chart, as for instance Michigan Exhibit 114.

[22] Wisconsin brief, pp. 266–267.

terial, except to show that when traffic finally did commence to go through Death's Door it needed a great deal of artificial protection to make the passage navigable with safety. The significant thing about the lighthouse situation is that the first light was placed on Rock Island because the ship channel was there.[23]

On pp. 85 counsel take up the subject of tradition, and state that their most direct evidence is that of the witnesses Cota, mother and son. We hope that the Court will read the testimony of these witnesses as it appears on pp. 279–319 of the record. A reading will be sufficient to disclose its wholly unreliable character. The mother was an old Indian woman with very slight command of the English language, and her testimony was elicited by questions of such leading character that they amounted virtually to putting words in the witness' mouth. Wisconsin objected strenuously to this process. The younger Cota was a man whose earliest memories did not extend beyond the '80s, and his testimony concerning the statements of his Indian grandfather are the most unreliable sort of hearsay.

On p. 85 counsel say that this same Dave Cota was their best witness. We are willing to accept this statement and content ourselves with urging the Court to read his testimony, which is a sufficient index of the entire unreliability of a large part of the evidence offered on behalf of Michigan.[24]

Counsel also assert that J. Hubert Frankcart furnished the "only other direct testimony." Frankcart is the gentleman who testified that when his mother-in-law came to Green Bay in 1804 steamships were plying in the waters of the Bay.[25] His whole testimony appears to us to be another "mother-in-law" joke.[26]

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[23] Wisconsin brief, pp 180–182.

[24] This testimony appears on pp. 301–319 of the record.

[25] Wisconsin brief, pp. 264–265.

[26] Frankcart's testimony appears on pp. 770–782 of the record.

On pp. 86-87 of their brief, Michigan's counsel devote considerable attention to material appearing in the various editions of Barnet's Coast Pilot for years between 1867 and 1874. We submit that this evidence has little bearing on the situation in the '30s. Counsel make a good deal of the alleged fact that the guides for the '60s and '70s give few directions for sailing through Rock Island passage; they say this indicates that Rock Island passage was not a usual channel in the '30s. On p. 87 of their brief, however, they state that the 1874 issue of the book is the first one in which appear directions for entering the harbor at Fox River, Green Bay. By counsel's reasoning, this would be proof that Green Bay was not a port in the '30s. This example of the result of counsel's argument is sufficient to discredit the whole of it.

On p. 90 it is asserted that there are no shoals in the Strawberry Channel. We refer the Court to the detailed chart appearing in evidence as Michigan's Exhibit 115, for complete refutation of this assertion.

On p. 90 counsel say:

> "A perfect harbor with good wood supplies every few miles and deep water close to the headlands made the passage easy."

The question of wood supplies is, of course, immaterial in a consideration of the channel in 1836, for sailing vessels did not need fuel, and steamers were in the most insignificant minority until after the Michigan boundary was established.[27] For evidence that the Strawberry passage was not easy, see pp. 255–257 of this brief.

On pp. 90 of Michigan's brief an attempt is made to show that the passage west of Chambers Island is beset by more dangerous shoals than that east of the island. This argument is sufficiently answered by an inspection of the accurate chart

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[27] Wisconsin brief, pp. 240–242.

appearing in evidence as Michigan Exhibit 115. How anybody can say that the western passage is more dangerous on account of shoals is beyond our conception.

On pp. 91 it is said that the water between Chambers Island and Green Island is the most dangerous spot in the district, because of lack of near protection, etc. The question of relative danger of the passages is sufficiently discussed on pp. 252–257 of this brief. Suffice it here to venture the suggestion that a ship navigator of the old days would rather take his chance with high waves in open water than he would to worm his way through a crooked rocky passage, simply for the sake of being close to land. The old navigators were not afraid of wind and waves, if we have read our history aright.

On pp. 93 of their brief, counsel emphasize the fact that the east shore of the Bay was coasted by Mackinaw boats. As we have previously pointed out, these tiny vessels could not have been the ships to which Congress referred in describing the boundary. There is no evidence that they did actually use the east passage more than the western one, in and prior to 1836.

From p. 93, we quote the following:

> "In fact until the settlement in Menominee brought sufficient traffic to call for a light on Chambers Island—the Strawberry Passage was practically the only one used * * "

This statement is wholly unsupported by the evidence in the record.

On p. 93 the following appears:

> "Without exception the historical articles bearing on the subject describe the passage along the East shore (see description of the egg battle at what is now Egg Harbor) * * "

The so-called historical articles upon which Michigan relies are apparently the journal of Douglass Houghton and Mrs.

Baird's description of her pleasure jaunt in 1825. Houghton crossed the bay from Mackinac to the Eagle Bluff region and camped for the night on Chambers Island, thus crossing both channels.[28] His mission was to study the rocks along the shore, and not to sail a vessel through the waters of Green Bay in the safest and most expeditious manner. Mrs. Baird's trip was a mere frolic, as is evidenced by the egg battle referred to.[29] The course taken on journeys such as these is no criterion of what was the most usual ship channel.

On p. 94 is the following assertion:

> "In support of Plaintiff's claims that the door and Strawberry passage were the most usual ship channel in 1836, it appears that they are now and always were so because they constitute the shorter—safer route for the greatest amount of traffic and further that this route was naturally followed because it was known and used by Indians who passed on their knowledge of it."

This is a generalization wholly without support in the record. Moreover, the evidence of a channel used by Indians is very doubtful, being in substance only hearsay evidence of the channel used by one Indian, the father and grandfather of the Cotas, the witnesses whose testimony we have above referred to as being wholly unreliable on its face. We offer the concluding suggestion that the custom of Indians in their canoes does not bear on the custom of navigators of ships.

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[28] Michigan Exhibit 93.
[29] Michigan Exhibit 155.

## CONCLUSION

In our conclusion to the summary at the beginning of this brief, we believe we have fully stated our view of the case so far as acquiescence is concerned. There remains only to add that in our judgment, so far at least as the Montreal River and Green Bay sections are concerned, Michigan has failed to make out her claim, and that no matter if she once had a claim as to the entire boundary or any section of the boundary, or even any island now claimed by her, she has fully waived such a claim by adopting the boundary line definition contained in the Wisconsin Enabling Act. For these reasons the present action should be dismissed, and Michigan should be denied any relief in the premises, except that should the Court conclude any portions of the boundary require marking at this time, commissioners should be appointed to survey and mark such portions.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1925**

**ORIGINAL, NO. 19**

**IN EQUITY**

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STATE OF MICHIGAN,

*Plaintiff,*

v.

STATE OF WISCONSIN,

*Defendant.*

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## REPLY BRIEF OF DEFENDANT STATE OF WISCONSIN

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## REPLY BRIEF OF DEFENDANT STATE OF WISCONSIN

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In answer to the reply brief of the plaintiff, we wish to direct the Court's attention at the outset to the statements made by counsel at the time permission was asked to file their reply brief. Counsel stated as one of their principal reasons for filing a reply brief the desire on their part to furnish the Court with references to parts of the record which supported their claims made in their original brief. Although this was the reason urged, no effort has been made to have the original brief comply with the rules of the Court in this respect, nor to furnish references for the numerous unsupported claims of

the principal brief submitted in this cause by the plaintiff. At pages 343–387 of our brief counsel had their attention called to specific misstatements in their brief as well as to unsupported assertions made by them in their brief. No effort has been made to sustain or explain the statements complained of, and for this reason we assume that counsel admit the charges made in that part of our original brief. They do state on pages 20–21 of their reply brief that they intend to answer our charges. In their effort to do this they state that the name Pinewood Lakes by which the lakes at the sources of the various tributaries of the Montreal River were known about the time of the delineation of the boundary was not ascribed to these lakes until after Cram had "called the lakes by that name." The quoted statement is startling because we are unable to find that Cram ever called this group of lakes the Pinewood Lakes. The fact is that he did not so state, and counsel made no effort to refer to any part of the record to support the claim made. Thus, it would seem that counsel seek to justify an improper conclusion from the evidence by making a statement entirely unsupported by the evidence. We call the attention of the Court to this fact because throughout the entire reply brief, statement after statement is made just as it was made in the original brief without referring to any part of the record for support. In most instances the statements are absolutely unsupported by anything in the record. In other instances the statements are directly opposed to all of the evidence in the record. We will not point to all of those instances because it would make the brief entirely too long. We refer to it generally, however, in order that the Court may know that we are not accepting or adopting the unsupported statements made by counsel in either their original brief or their reply brief.

In our original brief we also accused counsel of misquoting the evidence of the witness Betts. (Wisconsin brief, page 374.) Their reply is that:

"We said and still *believe* that Captain Betts testified to coming from Chicago by schooner through the Door passage in 1845 and that the old Pilot Island light was then burning." (Reply brief, page 21.)

They cite no authority in the record for this assertion except perhaps their "belief". In order to settle this controversy, we call the Court's attention to the record. Captain Betts testified as follows:

"Q Were you ever on the waters of Green Bay before 1858?

A Yes, I come through Death's Door in 1855 on a lumber vessel." (R. p. 27.)

On cross-examination he was asked:

"Q Now, you spoke about the light on Plum Island; that was burning, did you say, when you first came through Death's Door?

A Yes.

Q And that light was located at the point where the ruins are now located; is that right?

A Yes.

Q In other words, the ruins that are there on that island now are the ruins of the light that you saw when you first came through Death's Door?

A Yes, that is it exactly." (R. p. 39.)

Thus it will be observed that counsels' belief is directly opposed to the actual facts in the record. This, of course, also destroys their effort to claim that the Plum Island light was erected before 1850. (See our brief, pp. 180–185.)

They have made no effort whatsoever to explain any of the other misstatements and unsupported claims made in their original brief or to answer our charges in that respect.

**Montreal River Section**

Counsel also state on page 6 of the reply brief:

"Another copy, (referring to Plaintiff's Exhibit 7) with the line indicating the boundary, was found among

the personal effects of Lucius Lyon, in a bundle of newspapers bearing dates 1834 to 1836."

This is a misstatement of the facts in the record again, for on page 37 of the original stipulation accompanying the exhibits in this case, counsel for the plaintiff and the defendant stipulated:

> "Mr. Sherwood noticed a bundle of old newspapers which later were found to date from about 1834 to 1860, (not 1836) which Mr. Thayer told him had belonged to Lucius Lyon. Mr. Thayer then gave the bundle of newspapers to Mr. Sherwood, who has ever since had possession thereof. That quite recently said bundle of papers were opened in Mr. Sherwood's presence and the map, Plaintiff's Exhibit 6, was found among them, and had come with them when Mr. Sherwood got them from Mr. Thayer. Said map is furnished by said Sherwood to plaintiff's counsel"

The same assertion was made in the oral argument. We feel that it is entirely inexcusable because counsel must be held to have known the exact terms of their stipulation. If they did not know, it but illustrates again their entire recklessness in making claims and assertions in their argument and in their brief without regard to what the record actually shows. Counsel were of course anxious to claim the dates 1834–1836, because without those dates it became apparent to them that the rather extended argument on pages 9–11 of their principal brief falls entirely flat. In other words, because they have failed to show that Lucius Lyon had the map, Plaintiff's Exhibit 6, in his possession in 1836, they failed to connect the map in question with any action taken by Lucius Lyon. We think this failure is more clearly demonstrated by reason of the fact that when Lyon again refers to the boundary in 1839 and 1840, (See Wisconsin brief, pages 57–58) he does not refer to the Burr map, Plaintiff's Exhibit 6, or a similar map, but refers to a Farmer map. This fact and the fact that Plaintiff's Exhibit 49 shows that as early as January 5, 1834, Lucius

Lyon was furnished with a Farmer map, demonstrate quite clearly that not only have counsel failed to show that Lyon's information came from the Burr map, but it has been quite successfully demonstrated that his information came from the Farmer map to which he referred in his letter. (Wisconsin Exhibit 22.)

**Islands in Menominee River**

Counsel have called our attention on page 10 of their brief to a matter that we had overlooked in our original brief in connection with our argument on pages 99 to 109 of that brief, that is, that Congressman McClelland, who proposed to Congress the adjustment of the boundary line when the Wisconsin Enabling Act was passed, (see our brief, pages 80–82) was chairman of the committee of the Michigan constitutional convention that proposed the boundary provision of the Michigan constitution of 1850. In failing to call the Court's attention to that in our original brief, we feel we overlooked a point which clinches our argument that Michigan, by the adoption of the constitution of 1850, adopted the adjustments contained in the Wisconsin Enabling Act of 1846. When it is considered that the identical language which supplied the gap in the Michigan boundary between the headwaters of the Montreal River and Lac Vieux Desert was incorporated in the Michigan constitution by the efforts of the very man who was responsible for inserting it in the Wisconsin Enabling Act and who engineered the entire adjustment of boundaries as found in the Wisconsin Enabling Act, can there be any doubt as to what the understanding, purpose and intention of Michigan was when she adopted the language of the Wisconsin Enabling Act in her constitution of 1850? McClelland had proposed the filling in of the gap. He had proposed the division of the islands. He had proposed the reservation as to ratification by Michigan. At the constitutional convention of 1850 he procured the incorporation in the Michigan constitution of the

language which filled the gap. He was instrumental finally in obtaining official approval from his State. We think it is fair to say that he intended by that action to ratify and confirm the settlement and adjustment for which he labored when in Congress. For these reasons we say that not only must it be held that by the adoption of the constitution of 1850 Michigan accepted the boundary line between the Montreal River and Lac Vieux Desert, but she also accepted the division of the river islands, because both these propositions were united and were the adjustment contemplated by the Wisconsin Enabling Act of 1846.

Counsel claim in their brief that:

> "To hold the constitution of 1850 as a ratification would be to determine in effect that plaintiff must surrender to the defendant Merryman Island, Sawyer Island and Sugar Island, although not claimed by Wisconsin in its answer." (Reply brief, page 10.)

We have again examined our answer and while we have never claimed Merryman Island, there is nothing in our answer to indicate that we have waived any claim as to Sugar Island or Sawyer Island, and counsel have again misstated the situation in making that assertion as to Merryman Island.

The State of Wisconsin has always recognized the action taken by the Federal Government and the conclusion arrived at by the government officials that Merryman Island was not in fact an island, as it appears in a letter from J. M. Edmunds, Commissioner of the General Land Office, to Thomas J. Townsend, Surveyor General at Dubuque, Iowa, dated June 5, 1862, attached to Sheet 28, Wisconsin Exhibit 198, which reads as follows:

> "In regard, however, to the large island situated as above and the two smaller ones in Section 17, numbered as Lots 1 and 2, the provision of the law above mentioned does not apply for the reason that they are not in the Menominee River, but clearly east of it, the only color for supposing them within its limits being a small creek put-

ting out from the river eastwardly into the Michigan township so as to form the said islands. There can consequently be no good reason for doubts upon this point, and hence you are directed to treat them as lying in the State of Michigan."

Sawyer and Sugar Islands, however, are claimed by Wisconsin because Sawyer Island was surveyed as being a part of Wisconsin in 1854, and Sugar Island, so far as we have been able to find from the records, has never been claimed by Michigan.

Wisconsin claims and has always claimed that because her boundary provides that:

> "The line be so run as to include within the jurisdiction of Michigan all the islands in the Brule and Menominee rivers (to the extent in which said rivers are adopted as a boundary) down to and inclusive of Quinnesec Falls of the Menominee, and from thence the line should be so run as to include within the jurisdiction of Wisconsin all the islands in the Menominee river, from the falls aforesaid down to the junction of said rivers with Green Bay;"

the boundary should run along the main channel of the Menominee River from its mouth until it approaches the various islands in the river at points where islands are located, regardless of where the main channel may be. The boundary should be run so as to follow the channel between the respective islands and the mainland of Michigan up to Quinnesec Falls. From that point on it should follow the main channel of the Menominee River, except when any islands are encountered. Wherever islands are encountered, regardless of where the main channel may be, the line should be run so as to follow the channel between the Wisconsin mainland and the islands in question. In that manner the intention of Congress will be carried out. The boundary will then be run as it has been accepted ever since 1850, and it can be run with the least expense, trouble and inconvenience

to all parties concerned, and without any injustice to any of the parties.

Counsel also say "three [islands] (the principal ones) are surveyed in Michigan." (Reply brief, page 11.) Counsel have failed to specify what three islands they refer to, but we assume again in view of what was said on pages 10 and 11 of their reply brief that they refer to the three islands above mentioned. We have stated our position as to Merryman Island. As to Sawyer Island, counsel admit on page 10 of their reply brief that this island was surveyed in Wisconsin, but claim that taxation was abandoned by Wisconsin. We are unable to find any such evidence in the record. We find, however, that the Special Counsel for Michigan testified (R. p. 390) that this island was surveyed in Wisconsin, and an examination of Wisconsin Exhibit 336, reproduced at pages 295 and 297 of our main brief, shows it was sold for taxes as early as 1836.

As to Sugar Island, they claim that "sheet 36, defendant's Exhibit 197 shows the survey of Sugar Island in Michigan." We have again carefully examined this sheet. It shows the outlines of nine islands, none of which, however, were surveyed so far as the plat shows. No meander lines or posts are indicated or referred to on this plat. An examination of sheets 29, 30 and 31, Wisconsin Exhibit 198, shows the extensive meander post and meander line references that were incorporated in a plat when an island was surveyed. It is also to be noted that when an island was surveyed, it was assigned a lot number. None of this was done as to any of the islands shown on Sheet 36, Exhibit 197, from which, of course, it is quite apparent that counsel have again grievously erred in making the above assertion, and their claim that three of the principal islands are surveyed in Michigan is entirely unsupported by the record. The fact is that counsel have been unable to find anywhere in the record any evidence that a single island recognized by the Federal

Government as an island below Quinnesec Falls has ever been surveyed in Michigan, and the argument made on pages 10 and 11 of plaintiff's reply brief is an effort on the part of the plaintiff to supply by argument and unsupported statements, circumstances and support for Michigan's claims which counsel were unable to supply by witnesses or documentary proof.

The situation as it appears in the record is that Merryman Island, because the Federal Government concluded that it was not in fact an island, has been surrendered to Michigan by Wisconsin. As to the remaining islands, the record shows and our original brief demonstrates (pages 288 to 307) that all the valuable islands between the mouth of the Menominee River and Quinnesec Falls have been surveyed as being in Wisconsin, and taxed by Wisconsin or else owned by the government; that Wisconsin has successfully prevented Michigan from exercising authority over the islands in the Menominee River; that the complaint in this case admits that Wisconsin has possession of the islands in the Menominee River. While there are still some islands which are unsurveyed, these islands, as appears from Plaintiff's Exhibit 172 and Wisconsin Exhibits 197 and 198, are all very small and of little value. In some instances the expense of determining on which side of these islands the main channel of the Menominee River flows would be greater than the value of the islands involved. It was this thought that undoubtedly influenced Congress in making the division of the islands in 1846. It was this realization that undoubtedly persuaded Michigan to submit to the division of the islands, and because of this fact the boundary line should now be approved as it has been accepted for the period since 1850. Regardless of what counsel may say or claim in their brief, the fact remains that Michigan has been unable to point to a single instance in the record in this case where it was shown that she made any effort to claim any of the islands

below Quinnesec Falls, with the exception of Merryman Island, which was conceded to her on the theory that it was no island at all, and with the exception of another island near Menominee, Michigan, but as to this island the authorities of Wisconsin successfully defied the authorities of Michigan. (See our brief, pages 302–303.) These are the only instances where Michigan has ever asserted any claim to these islands in this entire period, and as pointed out in our brief, there is no authority given by the legislature to claim these islands now, from which we conclude that Michigan is willing still to stand by the bargain made by her Congressman McClelland in 1846.

**Green Bay Section**

On pages 19, 20 and 24, as well as in the charts attached to counsels' brief, counsel attempt to demonstrate that the channel through Rock Island is very narrow and dangerous. They have made a rough draft showing the various islands and shoals in the vicinity of the Rock Island passage. They state that the red line drawn immediately to the right or southeasterly of Rock Island indicates "the bottom in a parallel cross-section in the entrance of this passage," that is, a cross-section parallel to the cross-section produced by our Figures 29 and 30, and the red line in Figure 29 of their map is to indicate the area shown by the red line on Figure 30. By referring to their sketch opposite page 24 of the brief, it will be noted that the red line thus referred to is to refer to Fisherman Shoal. Counsel again have been guilty of distorting the facts in their effort to show the situation at the Rock Island entrance. They have misplaced Rock Island by placing it almost due east of Washington Island, while they have taken Fisherman Shoal, which is south of Rock Island, and placed it northeasterly of Rock Island. A close examination of Figure 30 will show Fisherman Shoal southeast of Rock Island and far removed from the red line shown by counsel. Fish

Island, which is north of Fisherman Shoal, is a little southeast of the northern point of Rock Island. These facts will be demonstrated by an examination of Plaintiff's Exhibit 114, from which Figure 30 was made. The region along the red line is not shoal water as claimed by counsel, but water from six to twenty-one fathoms in depth. Counsel also state that they have assumed that all of the soundings shown in Plaintiff's Exhibit 114 are in feet. If they had referred to their own exhibit (Plaintiff's Exhibit 114) under the subject of notes, they would have found there stated that "water areas with a depth to twenty-one feet are tinted in blue. Depths within tinted areas are in feet; those in untinted areas are in fathoms." They have drawn their red line through an area shown on Plaintiff's Exhibit 114 to show depth in fathoms, and claim in their brief that it is an area of depths in feet. But even that would not sustain their charges made on Figure 29, and so they shifted the location of Fisherman Shoal and Fish Island northerly and across the mouth of Rock Island passage.

We also claim that they have improperly shifted the St. Martin Island shoals and Nine Foot Shoal south of St. Martin Island and south of the point where they are actually shown on the maps, by extending their green line in Figure 30 beyond point "D" as indicated on our Figure 29 Point "D" is St. Martin Shoal, and a close examination of Figure 30 will show that St. Martin Shoal is at that point. We say, therefore, that the effort of counsel to overcome the graphical demonstration that Rock Island passage is wider than Death's Door has failed because counsel have not presented the facts as they appear in Plaintiff's Exhibit 114, and because counsel have misrepresented the actual situation in that region.

**Conclusion**

In conclusion we submit again that the entire cause should be dismissed, and that defendant's motion, made before the answer in this case was filed, and decision upon which was reserved at the time of the argument of the motion, should be granted, and that in granting it the Court should impose the costs of this proceeding, including the costs of preparing briefs and the record in this case, entirely upon the plaintiff, first, because she has failed to make out any case whatsoever on the facts; second, because it has conclusively been shown that there was no foundation for the action when it was commenced; and third, because counsel have failed to abide by the rules of this Court in the presentation of their case in that they have not furnished the Court with the authorities upon which they base their various claims, and that, moreover, they have repeatedly misstated the facts in order to make it appear that the proof submitted by them was greater than that actually sustained by the record.

In requesting such a decision we feel that we are not asking for more than the facts justify, because the claims made by the plaintiff in this case have been so extended and have required the expenditure of such large sums of money in the preparation of briefs and presentation of our case, that it now being demonstrated that there was no foundation for the claims originally, we should not be required to pay this large expense made necessary by the broad, general assertions contained in the complaint. We make this claim especially because we feel that we gave to counsel for the plaintiff every opportunity to avoid such a contingency by calling the Court's attention and calling counsels' attention to our theory and our claims in our original motion to dismiss.

In arguing and presenting that motion, counsel argued propositions and questions of fraud as the basis of their claim which have not been advanced at the argument of this case

now, and which we are confident they knew at that time could not be supported. Under all the circumstances, whatever expense is placed upon the State of Michigan in the way of costs in this case will be the result of her own actions, and we feel will be justly placed where the responsibility belongs.

For these reasons we respectfully submit that the complaint in this case should be dismissed, and that provision should be made for the taxation of costs to include the expense of preparation of exhibits, the expense of the commissioner, the expense of printing the record and the expense of printing the briefs in this case, all of which is respectfully submitted.

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